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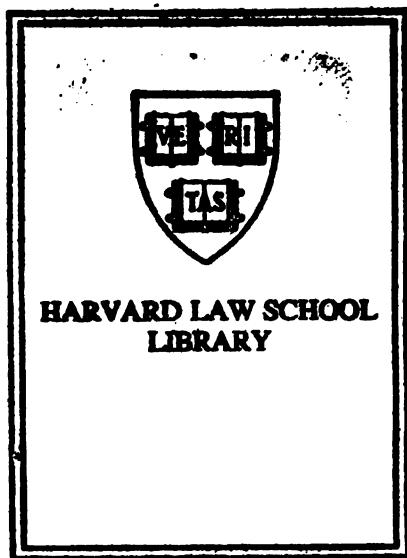
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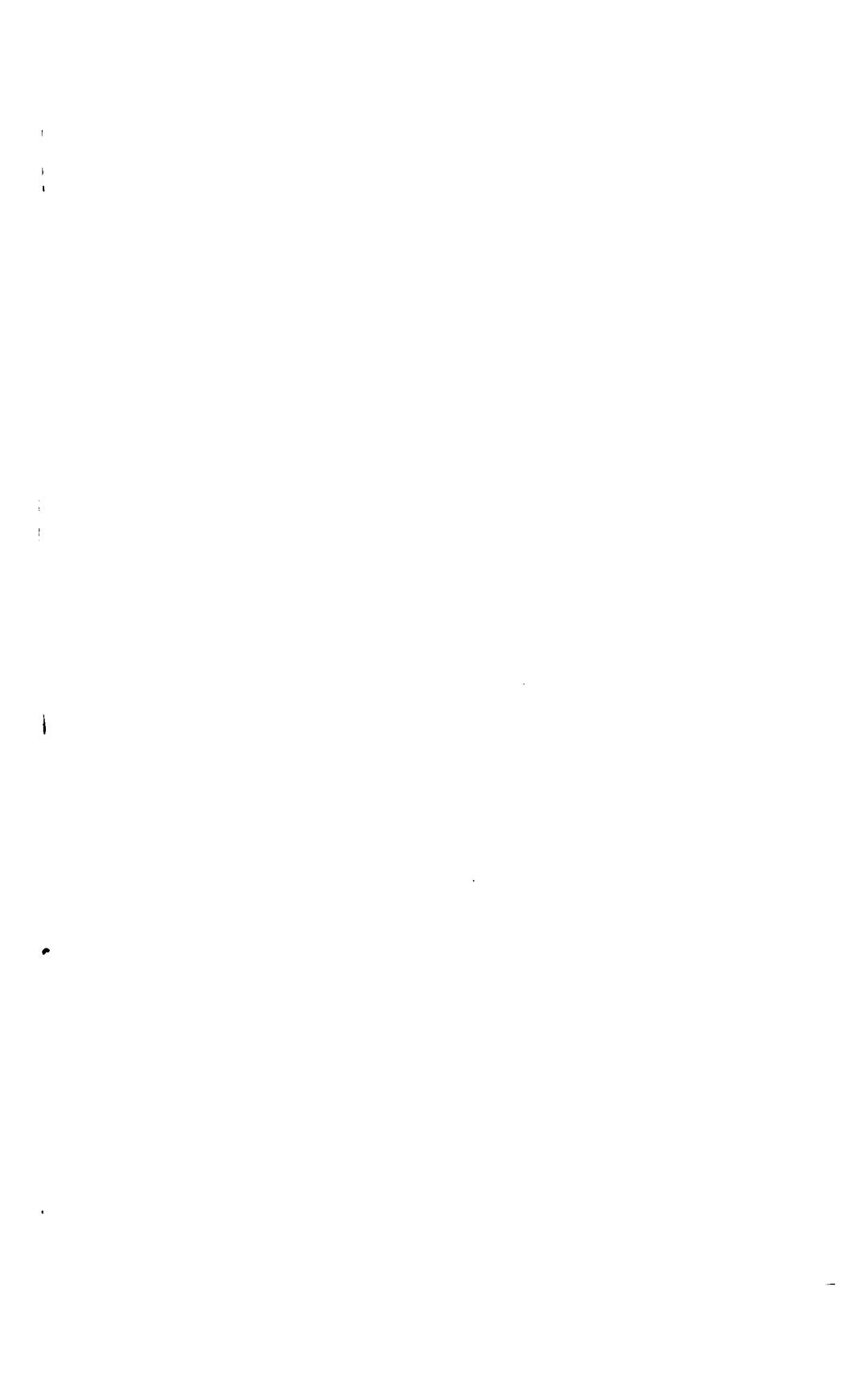
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June 14.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA.

FROM FEBRUARY 23, 1911, TO OCTOBER 21, 1911.

OFFICIAL REPORT.

VOLUME 43.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
1911.

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OF
THE SUPREME COURT OF THE STATE OF MONTANA,
DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.
THE HON. HENRY C. SMITH, } **Associate Justices.**
THE HON. WILLIAM L. HOLLOWAY, }

OFFICERS OF THE COURT:

ALBERT J. GALEN, Attorney General.

***W. H. POORMAN, Asst. Attorney General.**

J. A. POORE, Asst. Attorney General.

.W. S. TOWNER, Asst. Attorney General.

JOHN T. ATHEY, Clerk.

MARSHALL N. RACE, Marshal.

AUGUST C. SCHNEIDER, Court Stenographer.

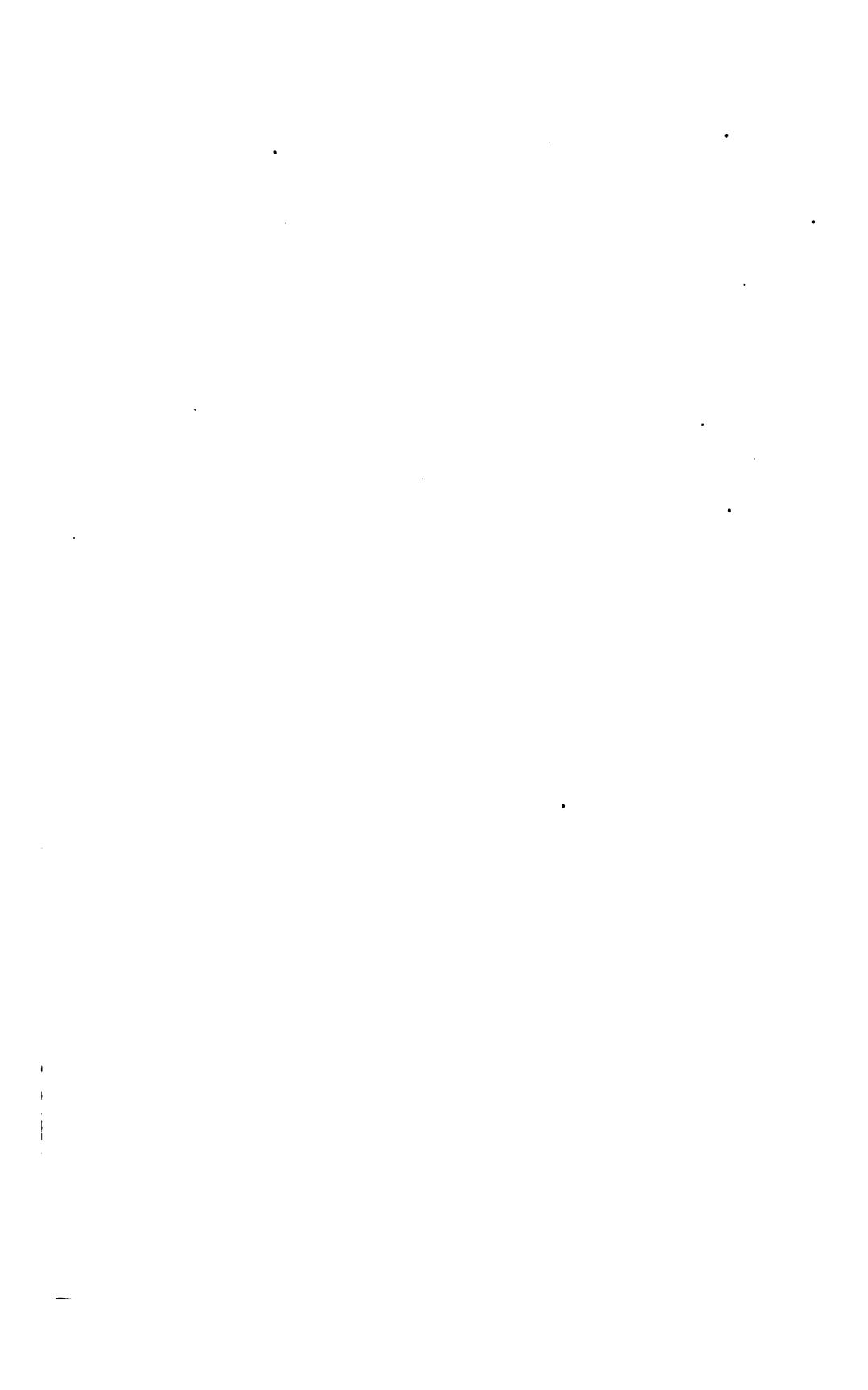
***Appointed June 1, 1911, to succeed Mr. W. L. Murphy, resigned.**



ATTORNEYS AND COUNSELORS AT LAW.

Admitted from May 13, 1911, to November 15, 1911.

AMBROSE, GEORGE L., Admitted June 16, 1911.
BARRERE, WARDEN, Admitted June 13, 1911.
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BOARMAN, MARCUS D., Admitted June 20, 1911.
BRIGGS, GEORGE W., Admitted May 13, 1911.
BROWN, WALTER S., Admitted September 25, 1911.
CALLOW, ALBERT A., Admitted October 9, 1911.
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TURCOTTE, FRANK W., Admitted June 16, 1911.
VERHEYEN, ALFRED J., Admitted September 20, 1911.
WHITLOCK, A. N., Admitted September 30, 1911.



DIRECTORY
OF THE
JUDICIAL DISTRICTS OF THE STATE OF MONTANA.
1911.

FIRST JUDICIAL DISTRICT.

County of Lewis and Clark. County Seat, Helena.
District Judges: Hon. James M. Clements; Hon. J. Miller Smith.
Officers: County Attorney, A. P. Heywood, Esq.; Clerk of District Court, F. L. Reece; Sheriff, M. L. Higgins.

SECOND JUDICIAL DISTRICT.

County of Silver Bow. County Seat, Butte.
District Judges: Hon. Michael Donlan; Hon. J. J. Lynch; Hon. J. B. McClernan.
Officers: County Attorney, Thomas J. Walker, Esq.; Clerk of District Court, John J. Foley; Sheriff, John K. O'Rourke.

THIRD JUDICIAL DISTRICT.

Counties of Deer Lodge, Powell and Granite.
District Judge: Hon. George B. Winston.
Officers of Deer Lodge County (County Seat, Anaconda)—
County Attorney, Thomas P. Stewart, Esq.; Clerk of District Court, Barney Hogan; Sheriff, James O'Keefe.
Officers of Powell County (County Seat, Deer Lodge)—
County Attorney, S. P. Wilson, Esq.; Clerk of District Court, R. Lee Kelley; Sheriff, Jos. E. Neville.
Officers of Granite County (County Seat, Philipsburg)—
County Attorney, David M. Durfee, Esq.; Clerk of District Court, George O. Burke; Sheriff, Frank M. Morse.

FOURTH JUDICIAL DISTRICT.

Counties of Missoula, Ravalli and Sanders.

District Judges: Hon. F. C. Webster; Hon. R. Lee McCoulough.

Officers of Missoula County (County Seat, Missoula)—County Attorney, Ed C. Mulroney, Esq.; Clerk of District Court, Thos. R. Conlon; Sheriff, W. L. Kelley.

Officers of Ravalli County (County Seat, Hamilton)—County Attorney, Howard C. Packer, Esq.; Clerk of District Court, A. C. Baker; Sheriff, George See.

Officers of Sanders County (County Seat, Thompson Falls)—County Attorney, L. C. Rinard; Clerk of District Court, W. E. Nippert; Sheriff, S. L. Vanderpool.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judges: Hon. Llewellyn L. Callaway; Hon. Joseph B. Poindexter.

Officers of Beaverhead County (County Seat, Dillon)—County Attorney, Henry G. Rodgers, Esq.; Clerk of District Court, F. A. Hazelbaker; Sheriff, O. C. Gosman.

Officers of Jefferson County (County Seat, Boulder)—County Attorney, Frank Showers, Esq.; Clerk of District Court, Wm. T. Sweet; Sheriff, P. J. Manning.

Officers of Madison County (County Seat, Virginia City)—County Attorney, Julian A. Knight, Esq.; Clerk of District Court, Matt. Carey; Sheriff, N. J. Traufier.

SIXTH JUDICIAL DISTRICT.

Counties of Park and Sweet Grass.

District Judge: Hon. Frank Henry.

Officers of Park County (County Seat, Livingston)—County Attorney, Fred L. Gibson, Esq.; Clerk of District Court, Arthur Davis; Sheriff, John Killorn.

Officers of Sweet Grass County (County Seat, Big Timber)—County Attorney, A. G. Hatch, Esq.; Clerk of District Court, F. M. Lamp; Sheriff, O. A. Fallang.

SEVENTH JUDICIAL DISTRICT.

Counties of Custer and Dawson.

District Judge: Hon. Sydney Sanner.

Officers of Custer County (County Seat, Miles City)—County Attorney, Sharpless Walker, Esq.; Clerk of District Court, James G. Ramsay; Sheriff, Ben Levalley.

Officers of Dawson County (County Seat, Glendive)—County Attorney, F. P. Leiper, Esq.; Clerk of District Court, Harry A. Sample; Sheriff, W. D. Wynn.

EIGHTH JUDICIAL DISTRICT.

Counties of Cascade and Teton.

District Judges: Hon. Jere B. Leslie; Hon. Harry H. Ewing.

Officers of Cascade County (County Seat, Great Falls)—County Attorney, H. S. Greene, Esq.; Clerk of District Court, Geo. Harper; Sheriff, John A. Collins.

Officers of Teton County (County Seat, Chouteau)—County Attorney, D. W. Doyle, Esq.; Clerk of District Court, James Gibson; Sheriff, K. McKenzie.

NINTH JUDICIAL DISTRICT.

Counties of Gallatin and Broadwater.

District Judge: Hon. W. R. C. Stewart.

Officers of Gallatin County (County Seat, Bozeman)—County Attorney, Justin M. Smith, Esq.; Clerk of District Court, J. A. Johnston; Sheriff, A. H. Sales.

Officers of Broadwater County (County Seat, Townsend)—County Attorney, Chas. P. Cotter, Esq.; Clerk of District Court, F. Bubser; Sheriff, Chas. P. Doggett.

TENTH JUDICIAL DISTRICT.

Counties of Fergus and Meagher.

District Judge: Hon. E. K. Cheadle.

Officers of Fergus County (County Seat, Lewistown)—County Attorney, Charles J. Marshall, Esq.; Clerk of District Court, J. B. Ritch; Sheriff, Wm. R. Woods.

JUDICIAL DISTRICTS OF THE

Officers of Meagher County (County Seat, White Sulphur Springs)—County Attorney, W. L. Ford, Esq.; Clerk of District Court, F. H. Mayn; Sheriff, Geo. L. Williams.

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Lincoln.

District Judge: Hon. John E. Erickson.

Officers of Flathead County (County Seat, Kalispell)—County Attorney, X. K. Stout, Esq.; Clerk of District Court, Sam. D. McNeely; Sheriff, A. J. Ingraham.

Officers of Lincoln County (County Seat, Libby)—County Attorney, John Cuffe, Esq.; Clerk of District Court, Philip R. Long; Sheriff, Frank R. Baney.

TWELFTH JUDICIAL DISTRICT.

Counties of Chouteau and Valley.

District Judges: Hon. John W. Tattan; Hon. Frank N. Utter.

Officers of Chouteau County (County Seat, Fort Benton)—County Attorney, B. L. Powers, Esq.; Clerk of District Court, C. H. Boyle; Sheriff, George Bickle.

Officers of Valley County (County Seat, Glasgow)—County Attorney, John Hurley, Esq.; Clerk of District Court, C. C. Beede; Sheriff, James R. Stephens.

THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Rosebud and Yellowstone.

District Judges: Hon. Sydney Fox; Hon. George W. Pierson.

Officers of Carbon County (County Seat, Red Lodge)—County Attorney, P. E. Allen, Esq.; Clerk of District Court, H. A. Simmons; Sheriff, F. S. Bachelder.

Officers of Rosebud County (County Seat, Forsyth)—County Attorney, C. L. Crum, Esq.; Clerk of District Court, D. J. Muri; Sheriff, N. G. McMullen.

Officers of Yellowstone County (County Seat, Billings)—County Attorney, Chas. A. Taylor, Esq.; Clerk of District Court, Lorin T. Jones; Sheriff, John C. Orrick.

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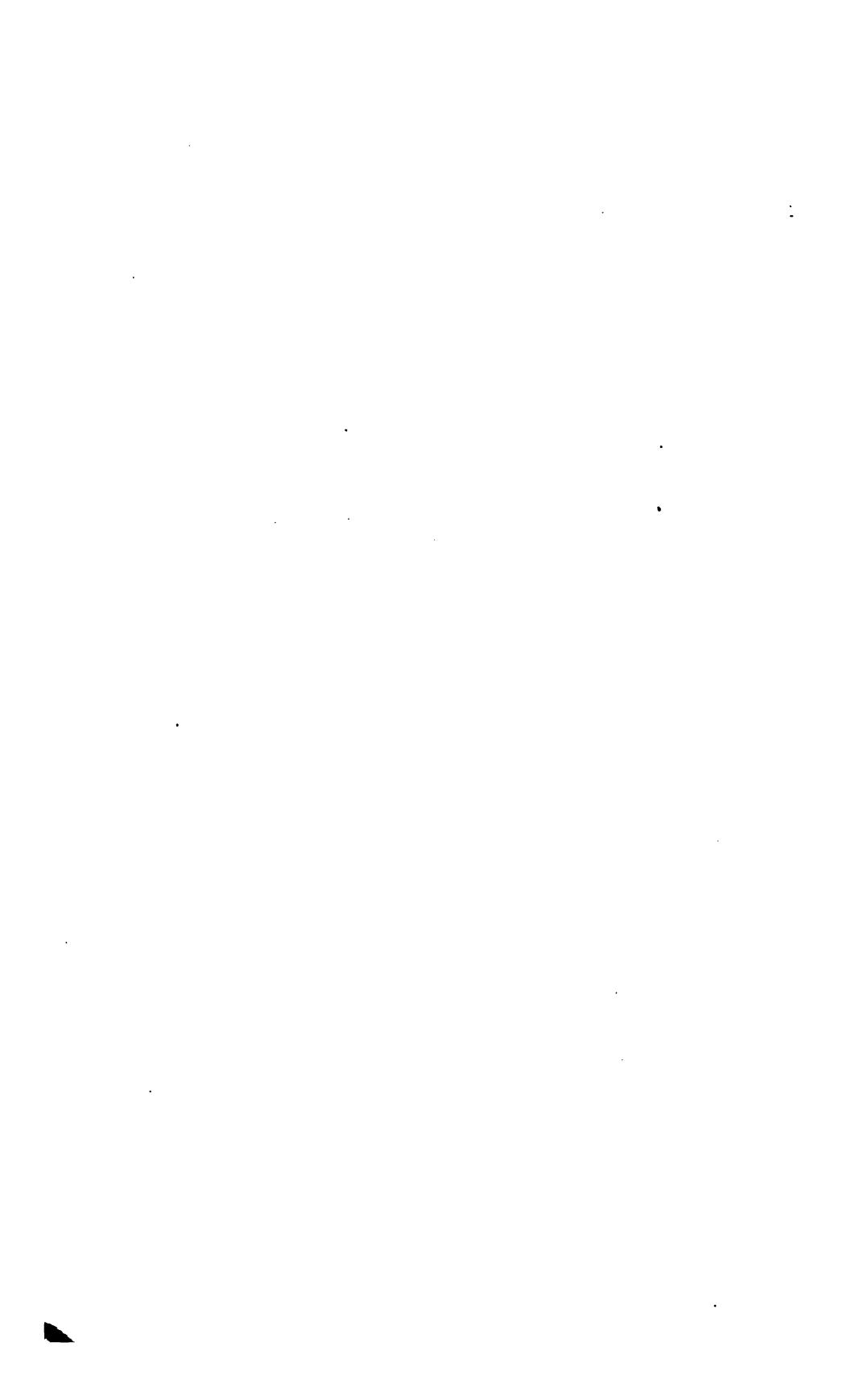


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SUPREME COURT RULES.

For Rules of the Supreme Court of the State of Montana, see 37 Mont., page xxiii.

AMENDMENTS.

ORDER.

It is ordered that the second paragraph of section 2 of Rule XXII of this court (37 Mont. xl), referring to the admission of attorneys from other jurisdictions, entitled, "Application, How Made," be amended so as to read as follows:

"Application, How Made.—A candidate for admission may make application at any time by filing a petition with the clerk, accompanied by the certificate hereinafter specified, and evidence of his good moral character. The clerk shall forthwith deliver the petition and other papers to the attorney general. If upon examination by him he is satisfied that the applicant is *prima facie* entitled to admission, he shall thereupon notify the applicant when the court will hear the application. The applicant need not appear until the motion for admission is made. All applications must be made upon motion of the attorney general or one of his assistants. The petition shall be verified and, in addition to the facts recited in section 6385, Revised Codes, 1907, shall show," etc.

The above paragraph of Rule XXII, as amended, shall be in full force and effect from and after sixty days from this date.

Promulgated June 22, 1911.

(xxiii)

ORDER.

It is ordered that paragraph 1 of Rule XXII, referring to the examination of candidates for admission to practice, be amended so as to read as follows:

"1. Examinations—When Held—Petition for Examination—Contents.—Examinations of candidates for admission to practice law in the courts of this state will be held in open court in the courtroom, at 10 o'clock A. M., on the first Wednesday after the first Tuesday of June and December of each year. Any person desiring to enter for examination must, at least ten days prior to the date of such examination, file with the clerk his verified petition, setting forth that he is a citizen of the United States and a resident of this state, of the age of twenty-one years. He shall also file with his petition a certificate of two reputable counselors at law of this state (or the affidavits of two nonresident attorneys) that he has been engaged in the study of law for two successive years prior to making his application. He shall also file with his petition testimonials of his good moral character, which must be satisfactory to the court. If such testimonials are furnished by others than attorneys of this state, they must be in the form of affidavits."

Promulgated November 28, 1911.

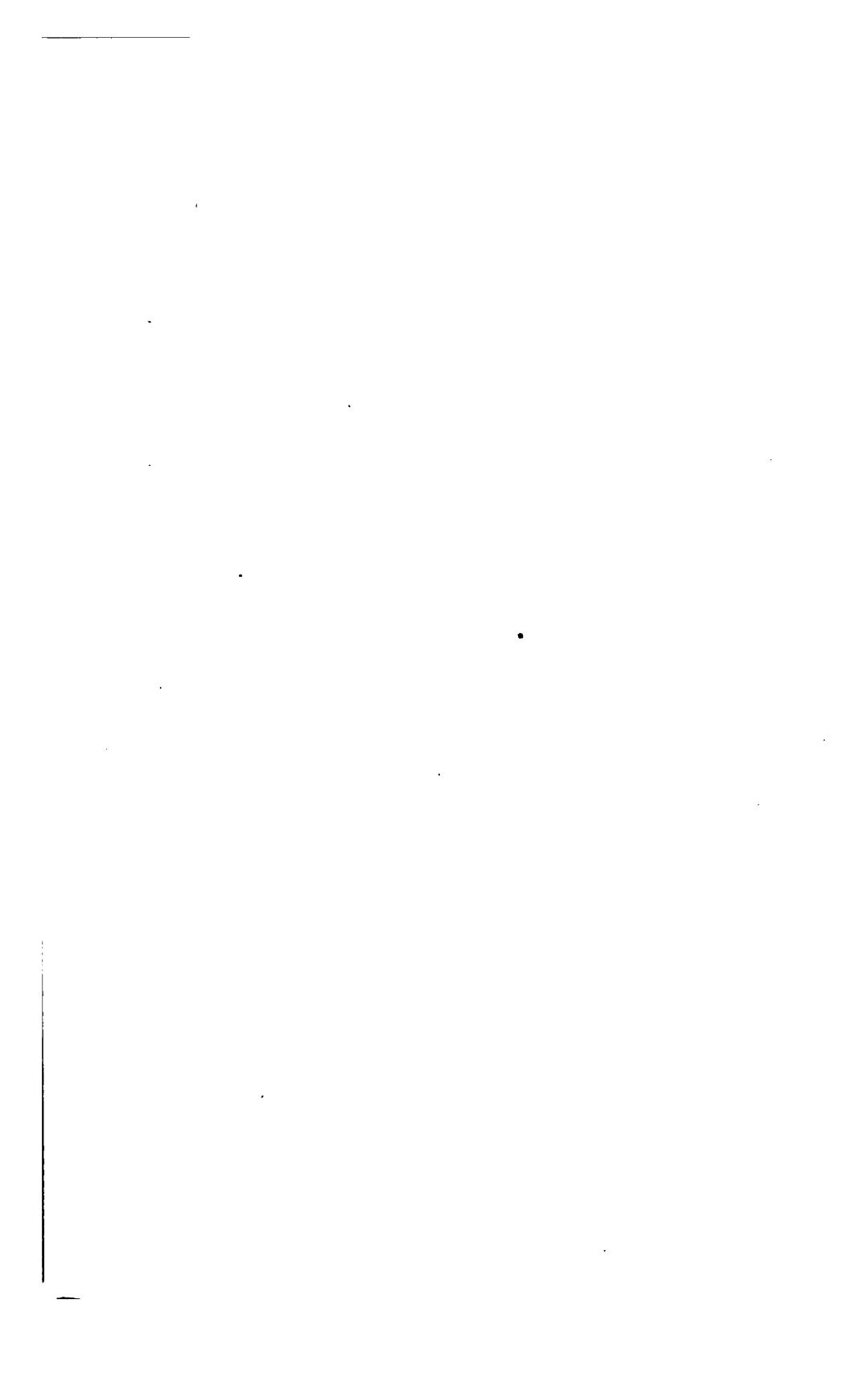
(xxiv)

NOTE.

Beginning with this volume, the person having occasion to consult these Reports will note black-faced figures, inclosed in brackets, at the head of certain lines interspersed throughout the course of the opinion part of the decisions, thus: [1], [2], etc. These figures are inserted to assist in readily turning to that portion of the text to which the even-numbered paragraph of the syllabus refers. They are uniformly placed at the head of the line to avoid confusion where paragraphs are numbered.

REPORTER.

(xxv)



CASES DETERMINED
IN THE
SUPREME COURT
AT THE
DECEMBER TERM, 1910.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH,
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

CARLSON, APPELLANT, v. CITY OF HELENA, RESPONDENT.

(No. 2,979.)

(Submitted February 3, 1911. Decided February 23, 1911.)

[114 Pac. 110.]

Cities and Towns—Installation of Municipal Water System—Bonds—Extension of Indebtedness—Elections—Water Rights—Rights of Prior Appropriators—Diversion—Who may not Complain—Ordinances—Form—Injunction.

Cities and Towns—Municipal Water Plant—Extension of Indebtedness—Submission to Electors—When Proper.

1. Where a city council had first acquired a pure and wholesome supply of water, ample for the needs of the city and its inhabitants, for a proposed water plant, and ascertained that the cost of installing it was within the compass of the sum which it could lawfully expend for that purpose, the submission of the question to the taxpayers (Rev. Codes, see. 3259) whether the city's limit of indebtedness should be exceeded in the amount so ascertained for the purpose of procuring and installing such supply was proper.

Same—Water Rights—Rights of Prior Appropriators—Diversion from Watershed.

2. A city had by purchase acquired the first four appropriations of water on a certain stream, the total quantity in which at certain seasons of the year does not exceed 150 inches, which amount was ample, however, to supply the needs of the city and its inhabitants. The fourth in point of time was decreed to it in the amount of 1,000 inches, with

the right to use it "beyond and without the watershed" of said creek. *Held*, in a suit for injunction, that under these conditions, the city was the first appropriator to the extent of 1,328 inches, the aggregate of the four appropriations, and that under the rule that a prior appropriator may change the point of his diversion or the use of his right, so long as it does not prejudicially affect that of any subsequent appropriator, the city had the right to divert the water from the watershed of the creek, in quantity sufficient to supply the needs of its proposed municipal water system.

Same—Diversion by Prior Appropriator—Who may not Complain.

3. One who is not a subsequent appropriator of water cannot complain that an intended diversion by a prior owner may injuriously affect someone who has a water right subsequent in point of time to that owned by the prior appropriator.

Same—Election—Ordinances—Form—Injunction.

4. The fact that an ordinance provided for a special election to determine whether the limit of the city's indebtedness should be extended for the purpose of "procuring a water supply" and constructing a water system, when the city had already purchased and paid for such supply, could not have so far misled the electors to their prejudice as to require the issuance of an injunction to prevent the holding of the election. The electors were not injured by reason of the fact that an initial expense of installing the plant had already been met without their knowledge.

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

SUIT by Oscar Carlson against the city of Helena to enjoin defendant from taking further proceedings to procure a water supply, etc. From a decree for defendant, plaintiff appeals.
Affirmed.

Mr. C. W. Wiley submitted a brief in behalf of Appellant, and argued the cause orally.

Messrs. Gunn & Hall, appearing as *amici curiae*, submitted a brief and reply brief. *Mr. M. S. Gunn* argued the cause orally.

In behalf of Respondent, city of Helena, *Mr. Edward Horsky*, City Attorney, submitted a brief and reply brief, and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On November 22, 1910, the plaintiff, a taxpayer, and the defendant city, submitted to the district court of Lewis and Clark

county, upon an agreed statement of facts, a controversy which had arisen respecting certain proceedings taken and contemplated by the city to secure a water supply to be owned, operated, and controlled by it. Many of the facts agreed upon have become so familiar by reason of their repeated recital in litigation heretofore that they will not be referred to specifically. It is sufficient for the purposes of this appeal to say that for many years the city of Helena has been indebted beyond the three per cent limit; that heretofore a private corporation has been supplying the city and its inhabitants with water under and by virtue of a franchise granted by the city; that the franchise expired on January 15, 1910, and the private concern has since, occupied the streets of the city by sufferance. Some time prior to October 10, 1910, the city council took steps looking to the acquisition of a water supply to be owned and controlled by the city, and to that end certain water rights in Beaver creek were purchased, and thereafter the matter referred to the water committee of the council, which reported on October 10, 1910, a comprehensive plan for the installation of a city-owned plant, if funds sufficient to meet the expense could be secured by vote of the qualified electors. The report of the committee was adopted by the council and Ordinance No. 785 passed and approved. This ordinance provides for holding a special election to determine whether the limit of the city's indebtedness shall be exceeded by the issuance and sale of city bonds to the amount of \$650,000, "for the purpose of procuring a water supply from Beaver creek and constructing a water system for said city." The purpose of this action is to secure an injunction prohibiting the city from proceeding further in the matter. The trial court determined the cause adversely to plaintiff's contention, refused an injunction, and rendered judgment in favor of the city, from which judgment this appeal is prosecuted.

The proceedings of the city are attacked upon the ground that Ordinance 785 does not submit the question to the voters in the [1] manner required by law. In *Carlson v. City of Helena*, 39 Mont. 82, 102 Pac. 39, a similar question was considered. In that case, however, it appeared affirmatively that the city council

had not ascertained that the particular water supply there in question could be procured, or that the installation of the system could be compassed by the amount of indebtedness sought to be incurred, and this court said: "The contention is that the council is authorized to consult the taxpayers in general, as to whether it may proceed to acquire a supply of water for the city, but that it may not devest itself of the discretion vested in it by law, as the governing body of the city, by leaving it to the electors to select a particular supply. This objection, it is said, is fundamental, because the discretion to purchase a particular supply is vested in the council, and this discretion cannot ordinarily be exercised until the council has ascertained that the particular supply is available, and that the cost of acquiring and installing it can be compassed by the amount of the indebtedness to be incurred. The contention must be sustained." The court further said, however: "If the council should have first ascertained that the particular supply could be acquired, and that the cost of it, together with the cost of installment, is within the compass of the sum which the city can lawfully expend for that purpose, then there could be no possible objection to allowing the voters to speak as to the propriety of securing the particular supply."

The question for determination here is: Has the city council ascertained that the Beaver creek supply is available, and that the cost of acquiring and installing it can be compassed by the amount of indebtedness sought to be incurred? It appears that the city has already acquired by purchase certain water rights in Beaver creek. These rights are: (1) Three agricultural appropriations: (a) The Reynolds right, of 67 miner's inches, appropriated March 31, 1865; (b) the Beatty *et al.* right, of 194 inches, appropriated April 1, 1865; and (c) the Davies right, of 67 miner's inches, appropriated October 1, 1865. (2) The French Bar placer mining right of 1,000, appropriated October 1, 1865. The rights of the several appropriators to the use of the waters of Beaver creek have heretofore been fully adjudicated, first in *Beatty v. Murray Placer Mining Company*, and again in *Spokane Ranch & Water Company v. Beatty et al.* The

first case was decided many years ago in the district court, and there was not any appeal. In the second case there was an attempted appeal to this court; but, by reason of the failure of appellants to give notice of appeal to all adverse parties, the appeal was dismissed. (*Spokane Ranch & Water Co. v. Beatty et al.*, 37 Mont. 342, 96 Pac. 727.) The dismissal of the appeal operated to affirm the decree of the district court. (Rev. Codes, sec. 7117.)

It is agreed that the waters of Beaver creek are pure and wholesome, and that the minimum supply is never less than 165 inches, and that this quantity is ample to meet the needs of the city and its inhabitants. It is further agreed that the city first determined that the cost of procuring this water supply for the city, including all the expense of right of way and installation of a water system, will not exceed the amount sought to be raised by this issue of bonds. There is left, then, but the single question: Does it appear that the city has a supply of water which is available? And this is to be answered by the reply to another question, *viz.*: Does it appear that the city of Helena can lawfully divert from the Beaver creek watershed sufficient water to supply its needs?

In the *Spokane Ranch & Water Co. Case* above the court decreed that the Reynolds right of 67 inches is the first in time and prior to all other rights; that the Beatty *et al.* right, of 194 inches, is the second; that the Davies right, of 67 inches, is the third; and the French Bar right, of 1,000 inches, is the fourth. With reference to the French Bar right, the court found: "(10) That on the first day of October, 1865, the said city of Helena, and its predecessors in interest, diverted 1,000 inches, being 25 cubic feet per second of the waters of Beaver creek, and appropriated the same for useful and beneficial purposes, through its French Bar ditch, extending from Beaver creek, in Broadwater county (then Jefferson county), state of Montana, to French Bar on the Missouri river, in Lewis and Clark county, said state, beyond the watershed of said Beaver creek, and appropriated the same for useful and beneficial purposes (being the same water right decreed, as of said date, to the Murray

Placer Mining Company in said decree), and ever since said date have continued to use the same through its French Bar ditch and by means of its ditch known as the Beaver Creek Company ditch, or Indian creek ditch, which said ditch extends from Beaver creek, Broadwater county, state of Montana, to Indian creek in said county, beyond and without the watershed of said Beaver creek, for useful and beneficial purposes." And the decree provides that the city "is entitled to use the same beyond and without the watershed of said Beaver creek."

Assuming, then, as the agreed statement of facts admits, that at certain seasons of every year the quantity of water in Beaver creek does not exceed 165 miner's inches, may the city still divert that water from the Beaver creek watershed? The decree in [2] the *Spokane Ranch & Water Company Case* above is a solemn adjudication that the city may rightfully use its French Bar right beyond and without the watershed of Beaver creek; and as there are but three appropriations prior in time and superior in right to the French Bar appropriation, and as the city owns all three of those prior appropriations, it is the first appropriator of all the waters of Beaver creek to the extent of 1,328 miner's inches. It is an elementary rule of law applicable to water rights that a prior appropriator may change the point of diversion or the use to which his water right has been applied, so long as it does not prejudicially affect the right of any subsequent appropriator. (Long on Irrigation, secs. 46, 50, and cases cited.) By virtue of its ownership of the first appropriation of 1,328 miner's inches, the city has *prima facie* the right to divert the waters of Beaver creek from the Beaver creek watershed, in quantity sufficient to supply its needs and the needs of its inhabitants.

Carlson is not one of the subsequent appropriators, and he cannot make the complaint that the diversion by the city may [3] injuriously affect someone who has a right to the use of the waters of Beaver creek subsequent in point of time to the rights owned by the city. If the time ever comes when a subsequent appropriator can show that he has a right which has been injuriously affected by reason of the city's diversion of the

water for city purposes, it will then be time to consider such claim; but it does not arise now.

So far as this record discloses, the city council, before calling the election, first ascertained that the particular supply has been acquired and that the cost of installment is within the compass of the sum which the city can lawfully expend for that purpose. Therefore, there cannot be any possible objection to allowing the voters to speak as to the propriety of securing the particular supply. (*Carlson v. City of Helena*, above.)

It is contended that Ordinance 785 is misleading, in that it [4] provides for submitting to the electors the question of procuring a water supply from Beaver creek; whereas, it appears that the city has already secured such supply. We do not think there is merit in this. It is true that the city has procured a water supply from Beaver creek, in the sense that it has already purchased and paid for certain water rights; but, in the sense that such supply has been brought to the city or made available for use in the city, it has not been procured, and certainly a voter would not be misled to his prejudice by reason of the fact that an initial expense has already been incurred and met, though he was not aware of it.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

HADDOX, APPELLANT, v. NORTHERN PACIFIC RAILWAY
CO. ET AL., RESPONDENTS.

(No. 2,931.)

(Submitted January 31, 1911. Decided February 23, 1911.)

[113 Pac. 1119.]

Railroads—Personal Injuries—Trespassers—Willful Negligence—Evidence—Insufficiency.

Negligence—"Willfully."

1. The rule prescribed by Revised Codes, section 8099, declaring that the word "willfully," when applied to the intent with which an act is done or omitted, implies simply a willingness to commit the act or make the omission referred to, and does not require any intent to violate law or to injure another, or to acquire any advantage, applies also in civil cases.

Evidence—Weight—Credibility of Witness—Disregarding Testimony.

2. Under Revised Codes, section 8028, paragraph 1, providing that the jury are to be instructed that their power of judging the effect of evidence must be exercised in subordination to the rules of evidence, juries may not arbitrarily disregard testimony of unimpeached witnesses supported by all the circumstances in the case.

Railroads—Injuries to Person on Track—Willful Act or Omission—Insufficiency of Evidence.

3. Evidence held insufficient to show that the death of one struck by an engine while on the track was due to any willful act or omission on the part of defendant railroad's engineer.

Appeal from District Court, Jefferson County; Llew. L. Callaway, Judge.

ACTION by Thomas Haddox against the Northern Pacific Railway Company, a corporation, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

In behalf of Appellant, *Messrs. Maury & Templeman, Mr. M. H. Parker, and Mr. J. O. Davies*, submitted a brief. Oral argument by *Mr. H. L. Maury*.

The acts of the defendant engineer have been tersely defined and the law relative thereto has been clearly set forth in one sentence. After speaking of the presumption that an engineer may indulge—that a person will leave the track at the sound of the whistle, and admitting its general force and effect—the

supreme court of Missouri added as its reason for affirming a judgment against the defendant, where the facts were similar to the one at bar: "Men cannot kill on presumptions when they know the grounds for the presumptions have ceased." (See *Bouwmeester v. Grand Rapids etc. Co.*, 63 Mich. 557, 30 N. W. 337.) If there be an intentional doing of the act which does the injury, and if the party doing the act is conscious that injury is likely to result from the doing of the act, then the failure to cease doing the act, and the failure to attempt by all possible means to prevent the injury constitutes a willful and a wanton act, for which the law allows no defense in the way of contributory negligence or assumption of the risk. (29 Cyc. 509.) Recoveries have often been allowed and the act criticised as willful or wanton, in the case of adults being run over by trains under exactly similar circumstances as the one at bar. (See case cited above; also *Kelly v. Ohio River Co.*, 58 W. Va. 216, 52 S. E. 520, 2 L. R. A., n. s., 898; 3 Elliott on Railways, sec. 1257a; White on Personal Injuries, sec. 1078; *Palmer v. Chicago etc. R. Co.*, 112 Ind. 250, 14 N. E. 75.)

Mr. Wm. Wallace, Jr., Mr. John G. Brown, and Messrs. Kelly & Kelly, submitted a brief in behalf of Respondents. *Mr. Brown* argued the cause orally.

When defendant engineer realized the boy's peril; he used all the means within his power to stop the train, but failed. No one could have stopped the train or done more. Such actions cannot be characterized as "willful and intentional disregard of a boy's life." The case comes squarely within that cited by the lower court (*Pittsburg etc. Railway v. Judd*, 10 Ind. App. 213, 36 N. E. 775), and also the case of *Alabama Co. v. Hall*, 105 Ala. 599, 17 South. 176, and the court's ruling was correct. In further support of it we submit the following: White on Personal Injuries on Railways, 1075 *et seq.*; Thompson on Negligence, sec. 1705 *et seq.*; *Friend v. Railway*, 104 Wis. 663, 80 N. W. 934; *Dull v. Railway*, 21 Ind. App. 571, 52 N. E. 1013; *Williams v. Railway*, 146 Ala. 680, 40 South. 143; *McLaughlin v. Railway*, 115 Ill. App. 262; *Smalley v. Railway*, 57 S. C. 243, 35 S. E. 489.

MR. JUSTICE SMITH delivered the opinion of the court.

On January 20, 1909, Omer Haddox, about fourteen years of age, a son of the plaintiff, was struck by an engine of the defendant company, in its yards at Whitehall, and killed. The engine was in charge of engineer Thomas Barry. The complaint alleges that Barry willfully and intentionally drove the engine against the boy at a rate of speed in excess of thirty miles per hour. The closing allegation is that the acts of the defendants were "willful, intentional, and in criminal disregard of the life and safety of the boy." No negligence is charged. Compensatory and punitive damages are demanded. Both parties introduced evidence. After the testimony was closed, the district court of Jefferson county directed a verdict for the defendants. Plaintiff appeals from the judgment entered on the verdict.

Wm. B. Huddleston testified for the plaintiff: "Before the engine struck the boy there was no unusual sound from the engine more than his whistle; the whistle was a danger signal—the stock whistle. The whistle must have sounded fully 200 yards before he struck the boy. Before the boy was struck he was walking toward the depot, west, with his head down, and just before the train struck him he looked up and across toward an engine that was on the sidetrack. He had a dog with him. Between the time that I heard this stock or emergency whistle and the time the boy was struck, he had not turned around toward the engine that was approaching him. I could not see any efforts that Mr. Barry made to stop that train before the boy was struck; I could not see inside the cab. I could not say that there was much checking of the speed; I could not see that he was making much effort to check the train—that is, at the time it struck the boy. The train stopped at the usual place by the depot where it formerly stopped. The boy was carried or thrown by the train in the neighborhood of thirty feet—some that measured it said it was thirty-seven feet; he was eight feet of [off] the track. When I first noticed the boy on the track he was, I should judge, 400 yards below the depot, east of the depot. I could not say how long he was on the track; he walked up, I

should judge, within 200 yards until the train struck him. When I first heard the stock whistle, I would judge the train was running thirty-five miles an hour or better. When it struck the boy, it probably had slowed a little; I could not tell exactly. Before the engineer got to the boy he could have seen him half a mile at least. If there had been any attempt to check the train before it struck the boy, I would not have noticed it particularly. I would have been able to see if any checking of speed had occurred. I did not see any checking of the speed of the train. The boy was struck under the left shoulder. I am certain that he was walking on the ends of the ties, because he was close to the rail. I made the statement at the coroner's inquest that I made the remark that the boy would get killed just as Barry jerked his whistle for the usual whistle when anything is on the track. He whistled along and ran up sixty or seventy feet, when he began to whistle short whistles up to the time the boy was struck. I also said in answer to the question, 'Could you tell whether or not the emergency brakes were applied?' 'I could not, only by the train slowing up.' I stated that the way I knew the emergency brakes were applied was by the train slowing up, and that statement was correct. There must have been a slow-up of that train. Barry was slowing up to come into Whitehall."

D. F. Riggs testified: "The train was running very fast in comparison to the usual running into the station. I would say it was very fast before and after it struck the boy. After the train struck the boy it stopped immediately afterward. It was right near the depot when it struck the boy, and it stopped at the depot, or just passed the depot; I think before it finally came to a standstill it just ran past the depot. It went the length of a train or a little more beyond the usual stopping place. I heard the train whistle; he whistled as he came to the depot, or nearing the depot. The stock whistle blew several times before the boy was struck; just before and about the time he was struck the whistle was blown. It must have been 300 or 400 feet, I would judge, from the train to the boy when the stock whistle was sounded."

E. O. Snails testified: "I heard the stock whistle from the engine. The stock whistle was blown seventy-five or eighty feet from the boy when I first noticed it. He also rang the bell. The train stopped in front of the depot, at the usual stopping place. I could not say for sure whether there was any checking of the speed for the stopping place or not. I saw the boy when he first went on the track. I should judge that was about 300 feet from where he was killed. He was going west, petting the dog on the head; he was looking down toward the dog. He made no movement whatever indicating that he saw the train. When the stock whistle started sounding, I should judge the train was about seventy-five or eighty feet from the boy. When I first saw the boy he was on the outer edge of the ties on the north side of the track. He was on the ties until the pilot hit him. I could not hardly judge how long he had been there. As I said before, he traveled in that way about 300 feet. He was just walking along slow, playing with the dog. I heard the accident whistle and the stock whistle and the crossing whistle."

Thomas Barry, the engineer, called by the plaintiff, testified: "The first I saw of the boy I was about ten car-lengths from him, when he first approached the track; that would be about 400 feet away. That train could be stopped in 300 feet, going thirty miles an hour at that point." On cross-examination he said: "When I first saw the boy, he was in a place of safety, clear of the rails." (Redirect.) "Q. How far from the place where he was struck was the boy when you first saw him? A. I could not say exactly to that; that ain't clear to me now how far he had walked along the track before I struck him. He was not in a place of danger when I first saw the boy; he got closer to the track afterward." (Recross.) "I could not stop my engine after the time that I saw the boy step from his place of safety into his place of danger. The train could not be stopped; it was impossible." The plaintiff here rested his case and the defendants moved for a nonsuit, which motion was overruled. Whereupon Barry testified for the defendants as follows: "When I first saw the boy, he was outside of the rails, clear of the engine, I should judge, about three feet when I first saw him, when he

started to walk up the track. He changed his location. By the time I started the stock whistle he started toward the track; he leaned off toward the track. When he came in toward the track, I put the brake into the emergency and tried to stop. There was nothing else that I could have done to have stopped the train, nor anyone else. The boy did not heed my danger signal; he never looked up. When I discovered he did not heed my signal, I started the stock whistle and put the brakes in the emergency, and did all I could to stop. I did all I could to avoid striking the boy; my intentions were not to strike the boy at any time. My purpose in sounding the stock whistle was to draw the boy's attention, so that he would step out of the way when he stepped in danger. If he had taken one step, he would have been out of the way. When I sounded the stock whistle, the engine was going about twenty miles an hour. When I struck the boy, I was going between twelve and fourteen miles an hour probably; it is pretty hard to judge about speed at a time when I was trying to stop. When I first sounded the stock whistle, going at the rate of twenty miles an hour, I could have stopped probably in 250 feet. I see the boy when he came up to the main line. I did not see him come from behind the cars; I did not know where he came from. I could not say how long the boy walked along the track before he was struck. He could not have walked very far; I could not say as to the distance. He did not ride the pilot. He was not knocked very far by the engine; I would say three or four feet. He did not go forward at all; just went out from the rails and fell down. I don't think he was playing with the dog; he had his left hand on the dog's head. He was looking down on the ground; seemed to have his head down. I did not see an engine opposite the boy. I did not reverse my engine. Had I done so I would not get any braking power at all. I had my driving brake set. If I had put the engine in the back motion, I would have skidded the locomotive, and that would not hold it near so much as with the driving brake set; you cannot use both to advantage. I released the air-brake just after striking the boy, and went on to the depot. I could have stopped in fifty or sixty feet, if I had left the brakes set. The boy was not

close to the track when I first saw him. He was not in reach of the pilot beam all the time. I was about seventy-five or eighty feet, maybe a little more, from him when I began to blow my stock whistle."

The witness was then asked concerning certain testimony given by him before the coroner, and he answered that he did not remember whether he so testified or not. Finally, his entire testimony given at the coroner's inquest was received in evidence by consent. We quote therefrom as follows: "When I first saw the boy, it seems he came out from behind two box-cars which were setting on the east end of the house track, and moved over to main line. I was about ten car-lengths away on the main line, coming to the station. I saw the boy alongside the track, and I whistled the road crossing whistle. At the same time the bell was ringing. I could not arouse him, so then I whistled the stock signal up until I struck him. When I saw I couldn't arouse him with the whistle, and he didn't turn around with me approaching, I put the brakes in the emergency notch and slowed down pretty slow. The boy was outside both rails and ties and with back to the engine was walking toward the station. The pilot beam extends beyond the ends of the ties. The boy rolled quite a way after he was hit. I do not think he heard the whistle; he would have looked up if he had. I put the brakes in the emergency notch before I blew the stock whistle, seeing that I couldn't arouse him. This was after I blew the road crossing whistle. I put on the emergency brakes just as soon as I saw him coming to the track. I supposed he was going to cross. He didn't cross, but started up alongside the track. Then I sounded the crossing whistle. He was in reach of the pilot beam all the time after coming to the track. He was quite a way east of the crossing when struck. I don't suppose he saw the engine." On further cross-examination he testified: "Q. The statement is true as you gave it here, that if you had not released the brakes, the door of the baggage-car would have stopped right at the boy? A. That would be a good deal of a guess, too. I thought at that time I could have stopped the train. Q. It would have stopped right there? A. Maybe sooner than that. Q. How is it pos-

sible, if that train was going fifteen miles an hour at that time, and could have been stopped in fifty or sixty feet, and yet you say that it would require 250 feet to have stopped in going twenty miles an hour? A. In that case the other 250 feet is different from the time I hit the boy; that is a different proposition entirely. In making the stop like that with the train that morning, I had these brakes set to their full capacity, and I would stop sooner than if I was going to set the brake to make a stop from the release position. The brake was set when I hit the boy to the full capacity, and I would stop that train quicker than if I had to set the brake."

It will be seen that the evidence is very meager as to what actually transpired. This is probably due to the fact that but a few seconds elapsed from the beginning to the end of the tragedy. Respondent's counsel contend that, because Barry was called as a witness by the plaintiff, the latter is bound by his testimony. We do not consider the matter important, and shall, moreover, treat all of the testimony as substantive in nature, notwithstanding that portions of it were given before the coroner. We do not attach much importance to Barry's statement that he did not intend to strike the boy. His acts speak for themselves so far as they are disclosed. We find no evidence that he intentionally ran his engine against the boy.

Was the death of Omer Haddox due to any willful act or omission on Barry's part? Our Penal Code (Rev. Codes, sec. 8099) declares that the word "willfully," when applied to the [1] intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage. No different rule applies in civil cases. (*Palmer v. Chicago etc. R. Co.*, 112 Ind. 250, 14 N. E. 70.) The boy in this case was a trespasser and was guilty of negligence. (*Egan v. Montana C. Ry. Co.*, 24 Mont. 569, 63 Pac. 831; *Neary v. Northern Pac. Ry. Co.*, 37 Mont. 461, 97 Pac. 944, 19 L. R. A., n. s., 446.) Perhaps, by application of the doctrine of the last clear chance, a case of negligence could have been made out against the engineer. That doctrine

applies to negligence cases, and is not invoked. Therefore, the only question is as above stated. The learned district judge held that there was no substantial testimony to warrant the conclusion that Barry was guilty of willful conduct. This court, in *Nearly v. Northern Pac. Ry. Co., supra*, quoting from Mr. Thompson's work on Negligence, said: "It must be kept in mind that this obligation of care and effort [to stop] does not necessarily commence at the time when the men who are driving the train see the trespasser on the track, for he may be a mile away, and in no immediate danger. It arises at the moment when he is seen to be in a perilous situation."

It is contended that Barry's testimony is contradicted and, contradictory, and might have been disregarded by the jury. And so it might have been, under certain circumstances. (*Bowen v. Webb*, 37 Mont. 479, 97 Pac. 839; *Poor v. Madison River P. Co.*, 38 Mont. 341, 99 Pac. 947; *Beeler v. Butte & London C. Dev. Co.*, 41 Mont. 465, 110 Pac. 528.) We shall therefore consider no part of it that is not corroborated. Juries may [2] not arbitrarily and capriciously disregard testimony of witnesses, not only unimpeached in any of the usual modes known to the law, but supported by all the circumstances in the case. (*Mobile etc. R. R. Co. v. Jackson*, 92 Miss. 517, 46 South. 142; Rev. Codes, par. 1, sec. 8028.)

It is quite evident from all of the testimony that Barry saw the boy as early as did any other witness; that is, when he first approached the track. The engineer is careful to say that at [3] *that time* he was not in a place of peril, which of course is true, because he had not yet reached the danger point. It is also evident that at about the time the boy came close to the track, Barry sounded the crossing whistle. If Huddleston's testimony is given the effect most favorable to the plaintiff, the engine traveled 600 feet after the boy reached a place of danger. He says it was going thirty-five miles per hour, which would be fifty-one and one-third feet per second. Barry says he was about seventy-five feet from the boy when he began to sound his stock whistle, and in this statement he is corroborated by Snails. The intervening distance is 525 feet, which the engine

would cover in about ten seconds, if no lessening of speed took place. But Barry declares he applied the emergency brakes before he sounded the stock whistle, and Huddleston testified that the emergency brakes were applied and the train "slowed up." This corroborating testimony of the plaintiff's witness, Huddleston, is, we think, decisive of the case. We are left to conjecture as to what space of time elapsed after Barry discovered the boy and before he applied the brakes. It was necessarily but a few seconds, less than ten, and during that time he first sounded the crossing whistle. He had a right to determine for himself, provided he acted in good faith, when the boy reached a place of peril. A failure to exercise ordinary care in so doing would amount to negligence. (*Neary v. Northern Pac. Ry. Co.*, 41 Mont. 480, 110 Pac. 226.) The testimony shows, therefore, that within a space of less than ten seconds Barry was required either to act or to refrain from acting. When he first saw the boy it was his privilege to exercise an honest judgment as to what his course of conduct should be. He sounded the crossing whistle, observed that it was not heeded, applied the emergency brakes, and then continuously sounded the stock whistle. These facts are established by uncontradicted evidence. The district court was asked to determine from them, not that there was sufficient evidence of negligence to go to the jury, but that there was substantial evidence that Barry had a purpose and willingness to omit to take precautions to avoid striking the boy. We think the court properly ruled that the record failed to establish such a cause of action. Barry was in effect charged with the crime of involuntary manslaughter, an offense of which he is presumed to be innocent (Rev. Codes, sec. 7962), and in our judgment there was no substantial evidence upon which to base such a charge.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

**KUPHAL, RESPONDENT, v. WESTERN MONTANA FLOURING
CO. ET AL., APPELLANTS.**

(No. 2,947.)

(Submitted February 3, 1911. Decided February 25, 1911.)

[114 Pac. 122.]

*Master and Servant—Personal Injuries—Dangerous Machinery—
Minors—Duty to Warn—Jury Question—Assumption of Risk
—Instructions — Pleading — Negligence — Willful Conduct—
Surplusage.*

Master and Servant—Injuries to Servant—Warning Servant.

1. Where a minor operating a ripsaw knew that it was a dangerous machine, and that if he came in contact with it he would be injured, it was not necessary to give him instructions on such points.

Same—Injuries to Servant—Questions for Jury.

2. Ordinarily, it is the function of the jury to say whether a minor servant comprehended the work in such a sense as to absolve the employer from the obligation to instruct him.

Same—Warning Servant.

3. Notice of danger is not enough, but a servant of immature age must have sufficient instruction to enable him to avoid the danger.

Same.

4. In an action for injuries to a minor operating a ripsaw, the question whether defendant was negligent in not sufficiently warning the servant of the danger, *held* for the jury.

Same.

5. The reason for warning a servant is either to impart to him knowledge that he does not possess, or to impress upon him the necessity of bearing in mind the danger.

Same—Assumption of Risk.

6. A minor assumes ordinary risks of any employment which he undertakes in so far as the risks are, or ought to have been, known to and appreciated by him.

Same.

7. Where a master negligently omits to instruct a minor servant, he does not assume those risks as to which instructions are necessary.

Same—Injuries to Servant.

8. In an action for injuries to a minor servant operating a ripsaw, plaintiff *held* not guilty of contributory negligence.

Same—Instructions.

9. In an action for injuries to a minor servant injured while operating a ripsaw, defendant requested an instruction that no duty rests on the master to warn and instruct youthful servants of ordinary risks and dangers which the servant actually knows and appreciates, or which are so open and apparent that one of his capacity would, under like circumstances, by the exercise of ordinary care, know and appreciate, and that if plaintiff knew and understood the dangers of operating the saw and the dangerous character of the appliance, and had received sufficient

instruction, he could not recover, which instruction was given, with the additional statement that the jury should consider the age and experience of plaintiff and all the surrounding circumstances, including the instructions given him, together with his knowledge of the dangers, latent or patent, and then find as a matter of fact whether the master knew, or in the exercise of ordinary care should have known, that the servant required additional warnings or precautionary instructions to enable him, if he heeded them, to avoid the dangers, and should in the exercise of ordinary care have instructed him accordingly. *Held*, that the instruction was correct.

Pleading—Surplusage.

10. Where, in an action for injuries to a servant, the complaint charged ordinary negligence, and did not as a matter of fact charge willful conduct, the words "reckless" and "wanton" were properly treated as surplusage, and a demurrer to the complaint, on the ground that it could not be determined therefrom whether the action was for simple negligence or for wanton or willful negligence, was properly overruled.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by Herbert Kuphal, by F. W. Kuphal, his guardian *ad litem*, against the Western Montana Flouring Company and another. From a judgment in favor of plaintiff, and an order denying them a new trial, defendants appeal. Affirmed.

Mr. W. M. Bickford, Mr. Geo. F. Shelton, Mr. John M. Evans, and Mr. John J. Marquette submitted a brief in behalf of Appellants. **Mr. Bickford** and **Mr. Marquette** argued the cause orally.

It is well settled that the duty of the master to warn and instruct a young and inexperienced servant applies only to the dangers which he knows, or which he, as an ordinarily prudent man, has reason to believe are not known to the servant, and will not be discovered by him in time to protect himself from injury. (*Yeager v. Burlington*, 93 Iowa, 1, 61 N. W. 215; *Newbury v. Getchel etc.*, 100 Iowa, 141, 62 Am. St. Rep. 582, 69 N. W. 743; *Stuart v. West End R. R.*, 163 Mass. 391, 40 N. E. 180; *Smith v. Irwin*, 51 N. J. L. 507, 14 Am. St. Rep. 699, 18 Atl. 852; *Beckham v. Hillier*, 47 N. J. L. 12.) No duty rests upon a master to warn and instruct even a youthful servant of the ordinary risks and dangers of the employment which the servant actually knows and appreciates, or which are so open and apparent that one of his age and capacity would, under like circumstances,

by the exercise of ordinary care, know and appreciate them. (*Strattner v. Wilmington El. Co.*, 3 Penne. (Del.) 245, 50 Atl. 57; *Jones v. Roberts*, 57 Ill. App. 56; *Bessey v. Newichawanick Co.*, 94 Me. 61, 46 Atl. 806; *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. 654; *Truntle v. North Star Woolen Mill Co.*, 57 Minn. 52, 58 N. W. 832; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Forquer v. Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843; *Mitchell v. Boston & Mont. Co.*, 37 Mont. 575, 97 Pac. 1033; *Worthington v. Goforth*, 124 Ala. 656, 26 South. 531; *Fones v. Phillips*, 39 Ark. 17, 43 Am. Rep. 264; *Fries v. American Lead Pencil Co.*, 141 Cal. 610, 75 Pac. 164; *Bibb Mfg. Co. v. Taylor*, 95 Ga. 615, 23 S. E. 188; *Kolb v. Chicago Stamping Co.*, 33 Ill. App. 488; *Brazil Coal Co. v. Cain*, 98 Ind. 282; *Atlas Engine Works v. Randall*, 100 Ind. 293, 50 Am. Rep. 798; *Pittsburg R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Toledo R. Co. v. Trimble*, 8 Ind. App. 333, 35 N. E. 716; *Rood v. Lawrence Mfg. Co.*, 155 Mass. 590, 30 N. E. 174; *Palmer v. Harrison*, 57 Mich. 182, 23 N. W. 624; *Wolski v. Knapp-Stout Co.*, 90 Wis. 178, 63 N. W. 87.)

Where a minor is familiar with the machine, and its character and operation are obvious, and he is aware of and fully appreciates the danger to be apprehended from working the machine, the fact that he is a minor does not alter the rule that the employee takes upon himself the risks which are patent and incident to the employment. (*Buckley v. Gutta Percha Co.*, 113 N. Y. 540, 21 N. E. 717; *Hickey v. Taffe*, 105 N. Y. 26, 12 N. E. 287.) So in the case of a minor who has been instructed as to the dangers incident to his employment, all ordinary and obvious risks are assumed by him. (*Groth v. Thomann*, 110 Wis. 488, 86 N. W. 180; *Jones v. Roberts*, 57 Ill. App. 56; *Fones v. Phillips*, 39 Ark. 17, 43 Am. Rep. 264; *Pratt v. Prouty*, 153 Mass. 333, 26 N. E. 1002; *Tinkham v. Sawyer*, 153 Mass. 485, 27 N. E. 6; *Gardner v. Cohannet*, 165 Mass. 507, 43 N. E. 294; *Greenwald v. Marquette Co.*, 49 Mich. 197, 13 N. W. 513; *Ludwig v. Pillsbury*, 35 Minn. 256, 28 N. W. 505; *Jenson v. Will & Finck Co.*, 150 Cal. 398, 89 Pac. 113; *Cudahy Packing Co. v. Marcan*, 106 Fed. 645, 45 C. C. A. 515, 54 L. R. A. 258.)

The injuries were caused by the contributory negligence of respondent. In this behalf the following rule is submitted: While it is true that the law makes allowances for the thoughtlessness of youth, all the recent cases go to the effect that where it appears plaintiff is a bright and intelligent youth, and, both knowing and understanding the danger incident to his act, nevertheless encounters it, his negligence should be declared as a matter of law under the rule which obtains in respect to persons *sui juris*. (*Herdt v. Koenig*, 137 Mo. App. 589, 119 S. W. 56; *Stegmann v. Gerber*, 146 Mo. App. 104, 123 S. W. 1041; *Littlejohn v. Central R. Co.*, 74 Ga. 396; *Bigelow v. Danielson*, 102 Wis. 470, 78 N. W. 599; *Silvia v. Sagamore Mfg. Co.*, 177 Mass. 476, 59 N. E. 73; *Morewood Co. v. Smith*, 25 Ind. App. 264, 57 N. E. 199.)

Messrs. Hall & Patterson submitted a brief in behalf of Respondent. Oral argument by *Mr. John E. Patterson*.

MR. JUSTICE SMITH delivered the opinion of the court.

The following statement of the issues tendered by the complaint is taken from the brief of counsel for the appellants: It is therein charged that Kuphal, a minor, was employed by the defendant corporation as a carpenter apprentice; that he was without previous experience in the operation of machinery, and when he had worked for but three days the defendants carelessly and negligently directed him to operate a ripsaw, a dangerous machine; that to order him to run said saw was not only careless and negligent conduct, but was wanton and reckless; that he was not suitably warned and instructed, and the defendants carelessly, negligently, wantonly, and recklessly put him at said work without suitably warning and instructing him; that, through the said alleged negligent acts of the defendants, he, in attempting to run and operate the saw, severed the thumb and forefinger from his left hand. The answer, after admitting the employment, denied the alleged acts of negligence, and as affirmative defenses pleaded contributory negligence on the part of plaintiff and assumption of risk. The cause was tried to the district court

of Missoula county sitting with a jury. Plaintiff had a verdict and judgment for \$2,500 damages. From the judgment and an order denying a new trial defendants have appealed.

Plaintiff testified that on April 11, 1907, he was nearly seventeen years of age. Mr. Goslee, the foreman, employed him on that day to do carpenter work. After working at that employment for three days, Goslee told him to go to the ripsaw and rip out some pulley slats. He had never done such work before. While standing by the ripsaw, Mr. Otto Swant, a cutter, came and asked him how he was getting on. He further testified: "Swant took one board and showed me how to rip it and then showed me another way. The way I took was what I thought was the easiest. When he showed me he told me to be sure and keep my hand on the piece that was between the saw and the gauge, and I was intent on holding that, and I never paid any attention to my left hand until—he put two boards through, first he showed me there, just one hand on the whole piece, by pushing the board clear through so when one strip came out with the board he held in his hand, he knocked that strip in a pile on one side. Another way he took hold his left hand onto this strip that was coming off and pushed it through, and, as soon as it was through, with his left hand he pushed up these into the scrap pile. He told me mostly to keep my hand on this piece, for the other would hold if it is close to the saw, might be caught by that saw and thrown back. He told me, where he worked in the east, a young fellow in the east, one of these pieces was thrown back and hit him and he died. Just as I pushed the board through, I felt a kind of thud. I was intent on holding that when I started in to rip. I saw to it that my left hand was clear, and just as I got past I felt a kind of thud and let go and jumped backward. My fingers were gone, I really don't know what happened. The way Swant did it it looked really easy, did not require any effort on his part. He was looking at me more than the piece while he was ripping, while he was telling me. When I pushed the board through, I was surprised it went so easy. I being used to ripping with the handsaw so it took quite an effort, but this here went through without any effort on my part. I was

surprised at the lack of resistance. It went through faster than I expected it would. I thought I had some talent for carpenter work; that was my bent, so to speak. I had used carpenters' tools and made some little things at the manual training school. Mr. Goslee did not tell me to go to Mr. Swant, just told me to go to rip the boards. I knew that if my fingers caught on that saw when it was revolving there it would cut them, but I did not think about cutting fingers at that time; I never had the slightest idea. I knew that, in order to avoid injury, it was necessary to keep my hand away from the saw. I knew that if my hand touched the saw it would injure it; but I was intent on holding that piece of board down. I was watching the saw. I was watching my right hand. Mr. Swant explained to me; he told me mostly; what he impressed on my mind was about that piece between the saw and the gauge, is what he impressed mostly. I was intent on holding that board more than anything else. It was not necessary for him to tell me if I caught my hand on that saw it was going to cut. I took that for granted. I knew that in order to avoid injury to my hand I must keep it off that revolving saw, but that strip was so narrow on the left-hand side that just putting your fingers on would naturally bring it close. If you cannot watch your hand, it will come closer to that saw than you think it is. It was my intention to keep my hands away from the saw. I did not want to get hurt. Swant showed me another way to rip, not requiring your left hand at all. The saw does not come toward you; you move toward the saw. I don't know about that saw not being perfectly stationary, because I never knew what to look for about the saw down there then; if I had known anything about it, I would have started ripping before Swant came. I returned to work on July 1, 1907, and worked about eighteen months. After Swant ran two boards through I took what I thought was the easiest way, using both hands to run the board through. They did not explain to me that it was much more dangerous when you had a narrow strip than it would be if you had a wider one. I was not told how easy the board would go through, how little resistance there would be. I was told that I might get hurt by the board on the right side;

that is, by the use of the gauge, if I did not hold that down it might fly and hurt me. There was no warning given me of any other danger."

Otto Swant testified: "Mr. Goslee, the boss, told me to go and show the boy how to rip that stuff. I found him over by the saw, and I ripped off three or four pieces for him and showed him how to do the work; then I let him; but he did not finish ripping the first one he attempted, for he cut his fingers. I was there three or four minutes before he was hurt while I told him, tried to make him realize everything that I could in that length of time. The very first board he put through was the one by which he got hurt. I told the boy that it was pretty dangerous work for him to tackle; told him that I would show him how, and I did. I showed him how to take hold of the board and how to push it through. I cautioned him the best I knew how, showed him how to take hold of the board, and told him about it being dangerous, that the board might fly up, and I told him to push the board beyond the saw; but when he got hurt he left the board sticking in it, in between the saw and the gauge. We were both in danger of being hit at that time, so I ran up and pushed the board over between the gauge and the saw. I showed him everything I thought I could show him without letting him do it myself. I don't know whether he made any answers when I was instructing him or not. The machinery was making a lot of noise; I don't remember. I would take hold of a board just this way and run it through, pass both of my hands beyond; showed him how to do it that way, and then said, 'Take your edging off and pull the board around this way.' I told him to take a hold of the board with his hand so that the saw would pass in between his both hands, and then said: 'You push it through until you get away on five, and then push the edging off the table, and then pull your board around the saw; never pull it up this way. If you let go of it, it will hit you.' When I explained to him about the dangers of the machine, I told him to be very careful of himself, to look out for himself, and not to mind the machine. I told him at that time it was pretty dangerous work

to put a boy at; that is what I said. I told him it was pretty dangerous work to put a boy of his age at."

Plaintiff here closed his case in chief, and the defendants interposed a motion for a nonsuit, which was overruled. Error is assigned upon the ruling; but we shall not consider it, for the reason that the plaintiff's case was very materially supplemented by the defendant Goslee while upon the witness-stand. He said: "I told Herbert he was not to go to the machines; he was instructed to keep away from them. I did not at that time or at any other time direct him to take lumber to the ripsaw and rip it. He had no instruction to rip it. I did not at any time before this injury instruct or direct the boy to run the ripsaw; I might have a year later. On this particular occasion I told him to take it to the machineman, I did not tell him to take it to the ripsaw. There were men there whose business it was to use those saws. I did not instruct the boy that he was to rip the lumber. I gave him to understand he was to keep away from the machine. There was a man there to run the machine, and I supposed he would take it to him. I said to him to take it to the machineman. I did not say to him at that time that he would have to learn to run a machine if he was going to work there. I knew that a ripsaw was a dangerous machine, inasmuch as every machine in a working institution is dangerous. I told Kuphal not to touch the ripsaw because I did not want him to go to the machine; I had other work for him to do. I foresaw that there was danger in an inexperienced boy working on this ripsaw." It will be noted that Goslee did not contradict that part of Swant's testimony wherein he said that Goslee directed him to show the boy how to rip the lumber. In rebuttal, plaintiff denied that Goslee ever told him to keep away from the machine or to take the work to the machineman. At the close of the testimony, defendants moved the court for a directed verdict in their favor; but the motion was overruled.

1. It is contended that there was no negligence on the part of the appellants. We are of opinion, however, that this was a matter for the jury to decide. The ripsaw was an obviously dangerous machine. Kuphal knew this, and knew, also, that if

[1] he came in contact with it he would be injured. It was not necessary to give him any information or instruction on either of these two points. (*Forquer v. Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843; *Mitchell v. Boston & Mont. etc. Co.*, 37 Mont. 575, 97 Pac. 1033.) Even so, the machine was so exceptionally dangerous that the defendant Goslee, according to the testimony of Kuphal and Swant, recognized the necessity of instructing him before he should be allowed to operate it; and according to his own testimony it was so dangerous that the boy ought not to have been allowed to use it at all. This testimony of Goslee in itself made out a cause of action for the plaintiff, because the jury might believe it and disbelieve his statement that he instructed plaintiff to keep entirely away from the saw. But we shall examine the other question presented, i. e., whether they were justified in concluding that plaintiff was not sufficiently warned and instructed. It may perhaps be said that, if it was negligence to allow the boy to operate the machine under any circumstances, it naturally follows that no amount of instruction would be adequate to protect him; but, as the cause was not submitted to the jury on that theory, we shall examine the theory upon which it was submitted.

Ordinarily, it is within the function of the jury to say whether a minor servant comprehended a work in such a sense as to [2] absolve the employer from the obligation to instruct him; but, if the jury believed the testimony of plaintiff and Swant, they must have concluded that Goslee thought instructions necessary. The only other question, then, on this branch of the case, is whether they might properly find that reasonable care [3] was not exercised in instructing him. Notice of danger is not enough. An employee of immature age must have sufficient instruction to enable him to avoid the danger. Whether adequate instructions were given is ordinarily a question for the jury to decide. As was said in the *Forquer Case, supra*: "The jury should consider the age, experience, or inexperience of the person injured, and all the surrounding circumstances, including the instructions given him, if any, as to what work he should perform and the manner of performing it, together with his knowl-

edge of the dangers, patent or latent, and then determine as a matter of fact whether the master knew, or in the exercise of ordinary care should have known, that the servant required additional warnings, explanations, or precautionary instructions to enable him, if he heeded the same, to avoid the dangers, and should, in the exercise of ordinary care, have instructed him accordingly." Swant testified that he gave such instructions as he thought necessary; but he very frankly admitted that he said at the time it was pretty dangerous work at which to put a boy of plaintiff's age. This statement in itself might well justify a jury in believing that the instructions given by Swant could not have been adequate under the circumstances. These two practical and skilled mechanics, Goslee and Swant, recognizing, as they admit, that the ripsaw was an extremely dangerous machine, and particularly so to a youth of no experience, allowed him to attempt its operation after instructions covering a period of but three or four minutes; the burden of such instructions being to pay particular attention to the piece of board ripped off, as it might fly back and injure the operator. Swant's instructions disclose the fact that the proper use of a ripsaw is a somewhat complicated and difficult operation, and this, taken in connection with other testimony of these two witnesses, and the further fact that the boy's fingers were cut off upon his first attempt to operate the machine, might well convince a reasonable man that the instructions given were not sufficient. Let us bear in mind, also, that the boy's fear of injury from a flying piece of lumber was excited by Swant's statement that he had seen a young fellow killed in that way, and that the instructions given were so inadequate that Kuphal neglected to do the very thing that Swant cautioned him to be sure to do; the latter being obliged to push the board through himself. Swant also testified that the noise of the machinery was such that he could not tell whether the boy made any answer to his instructions, and it might reasonably be inferred that the noise also interfered with Kuphal's hearing. It will also be remembered that there was testimony by the plaintiff that certain specified instructions were [4] not given him. In view of the foregoing considerations, we

think the question of defendant's negligence was one of fact for the jury to determine.

2. Again it is said that plaintiff assumed the risk of being injured as he was. The foregoing discussion really disposes of the question, because it establishes the proposition that it was a question of fact for the jury whether the plaintiff was sufficiently instructed to enable him to know and appreciate the danger incident to operating the ripsaw. The reason for warning a [5] servant is either to impart to him knowledge that he does not possess, or to impress upon him the necessity of being careful and bearing in mind the danger. (*Mitchell v. Boston & Mont. etc. Co., supra.*) When a jury finds that a minor servant required instructions in order to understand and appreciate a danger, and that such instructions, or adequate instructions, were not given, they find, in effect, that the servant did not assume the risk incident to the employment. The question is not whether he knew the physical conditions, but whether he appreciated the danger—a question of fact. (*Hollingsworth v. Davis-Daly Estates C. Co.*, 38 Mont. 143, 99 Pac. 142; *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45; *Forquer v. Slater Brick Co., supra*; *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29.) A minor [6] assumes the ordinary risks of any employment which he undertakes, in so far as those risks are, or ought to have been, known to and appreciated by him, whether the source of his knowledge be his own observation and experience, or the instructions which he has received from his employer. (1 Labatt on Master and Servant, p. 702.) It is immaterial whether his appreciation of a danger is gained from observation, experience, or instructions. (*Stegmann v. Gerber* (St. Louis Ct. of App.), 146 Mo. App. 104, 123 S. W. 1041.) But whereas an adult, in the absence of evidence which justifies an opposite conclusion, is presumed to comprehend the ordinary dangers incident to his employment, in the case of a minor the defense of an assumption of ordinary risks is viewed as one which is merely conditional upon the production of evidence going to show that the risk in question was comprehended. (1 Labatt on Master and Servant, p. 703.) A risk not comprehended by a minor is not assumed.

Mr. Labatt again says (volume 1, page 705) : "If the master has adequately performed his duty (by means of instruction), recovery by the servant becomes impossible for two reasons: First, because the master is guilty of no negligence in the premises; and, secondly, because a properly instructed minor servant must be taken to have understood the risks to which that instruction related, and, as the presumption of his ignorance of those risks is thus rebutted, his assumption of the risk becomes a necessary inference." A corollary of this rule must be that, if the master [7] negligently omits to instruct, the minor servant does not assume those risks as to which instructions are necessary. (See *Jones v. Florence Min. Co.*, 66 Wis. 268, 57 Am. Rep. 269, 28 N. W. 207.)

3. What has heretofore been said disposes of appellants' contention that no causal connection was shown between the alleged [8] failure to instruct and the injury to plaintiff. It also disposes of the question of contributory negligence of which it is urged the plaintiff was guilty, and, incidentally, of the contention that the evidence is insufficient to justify the verdict.

4. We think instruction No. 7, given by the court, was a correct statement of the law as applied to the facts in this case. The jury was therein advised that, if they found that plaintiff required instructions, it became the duty of the defendant to give them. This instruction, we think, fairly left the question of the necessity for instructions to the jury, although there was no serious issue on the point in the testimony.

5. Appellants requested the court to give the following instruction: "The jury are instructed that no duty rests upon the master to warn and instruct the youthful servants of the ordinary risks and dangers of the employment which the servant actually [9] knows and appreciates, or which are so open and apparent that one of his age and capacity and experience would, under like circumstances, by the exercise of ordinary care, know and appreciate; and if the jury find from the evidence that, at the time of the accident in question, the plaintiff knew and understood the dangers of operating the saw, and knew and appreciated the dangerous character of the instrument, and had received

due and sufficient instruction in its operation, then he cannot recover." The court gave the instruction after adding thereto the language employed by this court in the *Forquer Case, supra*, and heretofore in this opinion quoted. This was correct for the reasons hereinbefore stated.

6. The last error assigned is that the court erred in overruling a special demurrer to the complaint, interposed for the alleged reason that it cannot be determined therefrom whether plaintiff's cause of action is "for simple negligence, or for wanton or willful negligence." We think the demurrer was properly overruled. As a matter of fact, the complaint does not charge willful conduct. Ordinary negligence is all that is charged. The words "reckless" and "wanton" [10] were properly treated as surplusage. (*Neary v. Northern Pacific Ry. Co.*, 41 Mont. 480, 110 Pac. 226; *Cassidy v. Slemmons & Booth*, 41 Mont. 426, 109 Pac. 976; *Hoskins v. Northern Pacific Ry. Co.*, 39 Mont. 394, 102 Pac. 988; *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49; *Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A., n. s., 976; *First National Bank v. Carroll*, 35 Mont. 302, 88 Pac. 1012; see, also, *Haddox v. Northern Pacific Ry. Co.*, ante, p. 8, 113 Pac. 1119.)

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied March 24, 1911.

STATE, RESPONDENT, v. SUITOR, APPELLANT.

(No. 2,956.)

(Submitted February 4, 1911. Decided February 25, 1911.)

[114 Pac. 112.]

Criminal Law—Homicide—Circumstantial Evidence—Insufficiency—Admissions—Motive.**Criminal Law—Circumstantial Evidence—Conviction—Nature of Evidence Required.**

1. Where a conviction is sought upon circumstantial evidence, all the circumstances proved must be consistent with each other and with the hypothesis that the accused is guilty, and at the same time inconsistent with any other rational hypothesis.

Same—Motive—Significance of Evidence.

2. While it is not indispensable that motive be shown before conviction for homicide can follow, if the facts otherwise tend to show the commission of the crime, its presence or absence is significant in the light of the facts of the particular case.

Same—Admissions of Guilt—What are not.

3. A statement made by defendant, after he had been informed of the evidence which had been gathered against him, that he expected to be arrested upon a charge of murdering deceased, and one made to the sheriff at the time of his arrest, that he thought the officer was looking for him, and doubting that the authorities had much evidence against him, held not to have been implied admissions of guilt under the circumstances of the case.

Same—Murder—Conviction—Circumstantial Evidence—Insufficiency.

4. Held, that the circumstantial evidence upon which defendant was convicted of murder in the first degree did not exclude the hypothesis of his innocence, but only went so far as to induce the conclusion that he was probably guilty, and therefore was insufficient to justify a conviction.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

STEPHEN E. SUITOR was convicted of murder in the first degree, and appeals from the judgment and an order denying his motion for a new trial.

Mr. John A. Coleman submitted a brief in behalf of Appellant and argued the cause orally.

The verdict is contrary to law. It fails to find the degree of crime of which the defendant was found guilty, and failure

to designate the degree of crime vitiates the verdict, and no judgment could be legally rendered thereon. (*Territory v. Stears*, 2 Mont. 324; *People v. Marquis*, 15 Cal. 38; *People v. Campbell*, 40 Cal. 129; *People v. O'Neil*, 78 Cal. 388, 20 Pac. 705; *Kearney v. People*, 11 Colo. 258, 17 Pac. 782; *State v. Rover*, 10 Nev. 388, 21 Am. Rep. 745; *State v. Moran*, 7 Iowa, 236; *State v. Jackson*, 99 Mo. 60, 12 S. W. 367; *Tully v. People*, 6 Mich. 273; 21 Cyc. 1084.)

In behalf of the State, *Mr. Albert J. Galen*, Attorney General, and *Mr. J. A. Poore*, Assistant Attorney General, submitted a brief. *Mr. Poore* and *Mr. J. C. Huntoon*, who prosecuted defendant in the district court, argued the cause orally.

The object the legislature had in mind in enacting section 9324, Revised Codes, requiring the jury to find the degree of the crime of which they find accused guilty, whenever the crime is distinguished into degrees, evidently was to guard and protect the rights of the defendant, so that the court in inflicting the punishment might be advised of the exact degree of the crime of which he was convicted. (*People v. Rugg*, 98 N. Y. 551.) This being the object and purpose of the statute, if the verdict is so worded that the court can determine therefrom what it means, then the statute is complied with, even though it does not in so many words state the degree of the crime of which they find the defendant guilty. If the indictment is so drawn as plainly to show the degree of the crime charged, all the jury need do is to find the prisoner guilty in manner and form as he stands indicted, under statutes similar to our own requiring the jury to find the degree of the crime by their verdict. (*Commonwealth v. Flanagan*, 7 Watts & S. (Pa.) 418; *White v. Commonwealth*, 6 Binn. (Pa.) 183, 6 Am. Dec. 443; *Commonwealth v. Earle*, 1 Whart. (Pa.) 530; *Leschi v. Washington*, 1 Wash. Ter. 13.) Where the indictment charges defendant with murder in the first degree, and the verdict finds him "guilty in manner and form as he stands charged," the verdict sufficiently designates the degree. (*Kennedy v. State*, 6 Ind. 485; see, also, *State v.*

Weese, 53 Iowa, 92, 4 N. W. 827, decided under a statute practically the same as section 9324, *supra*; *State v. Gilchrist*, 113 N. C. 673, 8 S. E. 319; *People v. Rugg*, 98 N. Y. 551; *Hays v. Commonwealth*, 12 Ky. Law Rep. 611, 14 S. W. 833; *Fitzgerald v. People*, 37 N. Y. 420; *Kennedy v. People*, 39 N. Y. 250; *Bilansky v. State*, 3 Minn. 437.)

Every reasonable intendment will be made in favor of a verdict. (*Rose v. State*, 82 Ind. 346.) While verdicts in criminal cases should be certain and import a definite meaning, free from ambiguity, yet they should be considered with reference to the indictment and the entire record, and any words which convey beyond a reasonable doubt the meaning and intention of the jury are sufficient, and all fair intendments will be made to support the verdict. (*Albritton v. State*, 54 Fla. 6, 44 South. 745; *O'Neal v. State*, 54 Fla. 96, 44 South. 940; *Edwards v. State*, 54 Fla. 40, 45 South. 21; *Pugh v. State*, 55 Fla. 150, 45 South. 1023; 12 Cyc. 690, note.) A verdict which fails to specify the degree of murder of which the defendant is found guilty is not void. (*State v. Jennings*, 24 Kan. 650.) Where the jury find the defendant guilty in "manner and form as indicted," and the wording of the indictment applies as well to second as first degree murder, the court should enter judgment for the second degree. (*Johnson v. Commonwealth*, 24 Pa. 390; *Garvey v. People*, 6 Colo. 559, 45 Am. Rep. 531.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was convicted of murder in the first degree and sentenced to undergo punishment by confinement in the state prison for life. He has appealed from the judgment and an order denying him a new trial. Two contentions are made in his behalf, *viz.*: That the evidence is insufficient to justify the verdict, and that the verdict is contrary to law.

The evidence is entirely circumstantial. The defendant at the time of the homicide was residing alone in a cabin a few miles northeast of the village of Giltedge, in Fergus county. He was

the owner of cattle which ranged over the mountains to the north and west. The Spotted Horse and Cumberland mines are about two miles to the northwest of defendant's home. The village of Maiden is to the west and some distance farther, so that its position with reference to Giltedge is northwest, and with reference to these mines southwest. The road from Giltedge to Maiden winds for a distance to the northwest through Maiden canyon, and then turns west. From this point a branch road leads northward up the canyon to the Spotted Horse mine, thence to the Cumberland, half a mile farther, and thence north over a low divide connecting with another road coming from the northeast, called the Ft. Maginnis road. On the right to one going up the canyon, about 700 feet directly east from the point where the road turns west to Maiden, and about 250 feet above the level of the road, in an open park, is situated the Hertford quartz claim, belonging to one Mellor. The ascent in that direction is precipitous and covered with timber. A person at work on the claim cannot be seen by one passing along the canyon nearer than from a point about 2,500 feet in the direction of Giltedge. The deceased, Thomas Burke, was a miner, and occupied alone a cabin in the canyon near the road leading to the Spotted Horse mine. The cabin is on a direct line between the mine boarding-house and the Hertford claim, about 700 feet from the former and 1,000 from the latter. The Cumberland boarding-house is several hundred feet to the northwest beyond the Spotted Horse boarding-house. The Hertford claim is not visible from any of these points. From it the surface of the country first ascends rapidly for somewhat more than a mile to the northeast and east, and then gradually descends to the level of the Ft. Maginnis road on the north and toward the home of the defendant to the east. It is rough and precipitous, so that in order to conveniently reach the Hertford claim from the home of defendant, either on foot or horseback, it is necessary to travel three or four miles around the base of the mountain toward the south and approach it by the road from Giltedge, or to go northward to the Ft. Maginnis road and come into Maiden canyon from the north over the divide, traveling about the same distance. One

witness stated that the claim might be reached from defendant's place by going directly across the mountain on horseback.

This brief description of the locality where the homicide occurred and the surroundings is necessary to an understanding of the evidence, of which the following is a summary:

On June 28, 1910, Thomas Burke was in the employ of Mellor, and engaged in doing discovery work on the Hertford claim. Its location seems not to have been completed. He was seen to leave his cabin with his lunch bucket about 8 o'clock in the morning, taking the trail along the eastern wall of the canyon leading up to the claim. This was the last time he was seen alive by any witness. About 11 o'clock in the forenoon he fired a blast, the report of which was heard by several witnesses at the Spotted Horse and Cumberland mines. About 3 o'clock in the afternoon another report was heard in the direction of the claim, which, in the opinion of these witnesses, was made by the discharge of a shotgun. Mellor was in the employ of the Cumberland Mining Company. He went to the cabin of Burke on the evening of the 28th, but found no one there. He returned the following evening, and, finding no one there, wrote a note to deceased and left it for him. Later the same evening he again returned, and, finding that the deceased was still absent, went to the claim in search of him, thinking he might have been injured. On arriving there in the dusk, he found the body of the deceased lying face downward in an open cut in which he had been at work. He at once notified the sheriff and coroner. An examination made of the body the next morning revealed the fact that the deceased had been killed by a discharge of what appeared to be six buckshot, fired into his breast from the right and somewhat above and from a short distance, and that they all entered within a space of three inches square, tearing his heart into shreds. The nature of the wound and the position of the body indicated that he had probably been called by the assassin and shot down as he turned to answer. There was no evidence of a struggle. The lunch bucket was found empty. The surroundings indicated that the deceased had fired a blast, and that at the time he was killed he was engaged in shoveling the debris out upon the lips of the

cut. Leading from the cut to a small tree below and toward the road were found the tracks of a man, and below the tree along the slope was the track of a small horse, which in the opinion of a witness was not very old, though he did not notice it closely enough to determine whether it was old or new. These led down toward the road in the canyon. On the 1st or 2d of July a deputy sheriff examined the ground in the vicinity. In a small park hidden in the timber across the road in the canyon he found a faint trail in the grass which appeared to have been made by someone going in and returning. On the left lip of the cut and toward the face of it there was picked up an ordinary twelve-gauge felt shotgun wad. This bore on one side the marks of buckshot. A day or two afterward a twelve-gauge cardboard shotgun wad was found in the loose dirt in the cut. It was of a pink or yellow color on one side and white on the other. It was shown that in addition to felt wads a wad similar in color and material is used by the manufacturer in loading what is known to sportsmen and the trade as "Peter's Ideal shells." It is placed over the shot. The pink or yellow color is the same as that of the outside covering of a Peter's Ideal shell, no other manufacturer using it. On one side of the wad found were marks of small shot. Five shots were taken from the body, and upon examination some of them appeared to have been whittled down to make them chamber in a twelve-gauge shell.

The defendant was arrested upon a charge of murder on July 6. At his house was found, among his other weapons, a twelve-gauge double-barreled shotgun. The firing apparatus of the right barrel was out of repair. In the opinion of witnesses who examined it then, the left barrel had been recently fired, and streaks along the bore indicated that the last charge fired from it had consisted of buckshot or other large shot. Scattered about the premises outside the cabin were found several exploded Peter's Ideal shells, all twelve-gauge in size. The following conversation occurred between him and the sheriff at the time of his arrest: "Q. You were here the other day, wasn't you? A. No; I was over this way, but I was not here. Q. I heard you were here. I thought you were looking for me. I guess they

haven't got much evidence against me, have they?" Questioned as to his whereabouts on June 28, he did not give a definite answer. He remarked that he had heard someone telling that he had been at Giltedge trying to buy buckshot. On the evening of June 14 he was at Lewistown in company with the witness Lang-doe. The two went to a restaurant to eat. On the way the defendant asked the witness if he could shoot coyotes with buck-shot. The witness replied: "Yes; if you are close enough." Defendant then said: "Well, I believe I will go to the hardware [store] and get some." The witness stated that defendant then started toward the Judith Hardware Company's store, but found the door locked. The next day a man called at the store and purchased two pounds of buckshot of different sizes mixed. The identification of this man as the defendant rests upon the testimony of the salesman, which is as follows: "Q. Ask you to state whether or not it was to him [defendant] the sale was made. A. I cannot say definitely. Q. Well, say to the best of your judgment. A. Why, to the best of my judgment it is the gentleman. Q. And where did you next see the gentleman to whom you sold the shot? A. At the time I came with the sheriff up to his residence." At another place in his testimony he stated that he had described the purchaser of the shot to the sheriff, and that his description "tallied very good with Mr. Suitor. * * * Well, he struck me as being a peculiar appearing and a typical western man." He could not describe the defendant's clothing further than to say that the hat he had on at that time seemed the same he had when arrested, "rather a western style of hat." This witness had accompanied the sheriff at the time the arrest was made. At the preliminary hearing he had testified that he recognized the defendant by his beard, his movements, and his voice. This was the only witness, other than Langdoc, who testified concerning the purchase of the buckshot, or who spoke as to the identity of the defendant as the purchaser. The evidence is not definite as to what sizes were included in the lot, but it appears that there were probably some of sizes Nos. 3, 4, and 5, and perhaps 6. Nos. 5 and 6 chamber in a twelve-gauge shell, but No. 4 will not. Three of the shot taken from the body of de-

ceased weighed less than either No. 4, 5, or 6, and are referred to by one witness as Nos. 2, 3, and 4. A fourth weighed considerably heavier than any of the sizes mentioned. On the day of defendant's arrest and afterward on two different occasions, his house and premises were searched minutely. Besides the exploded shells already mentioned others were found scattered about. All bore evidence of having been exploded some time before. Among the ashes in the cooking stove, which was apparently also used for heating purposes, there was found the brass butt of a Peter's Ideal shell which had been burned. That it had been exploded was apparent from the condition of the fuse. The point of the left firing-pin of defendant's gun, either because of the shape of it or because it did not strike true, marked the fuse of a shell exploded by it at one side. Many of the shells found, including the one burned, bore this mark. There were found on a shelf near the stove a twelve-gauge gun wad and two paper wad covers. No buckshot were found nor any loaded shotgun shells, though there were cartridges for the other weapons—two rifles and an automatic pistol. Defendant usually wore a black hat. At about 11:30 on the morning of June 28 the same witness who had seen the deceased leave his cabin for work observed a man following the trail taken by deceased toward the Hertford claim. He wore a black hat, but no coat. His shirt was of a light color. The witness could not recognize him. He was carrying something which witness thought was a gun. In traveling over the range to look after his cattle, the defendant would sometimes go on horseback, but frequently walked. The horse he rode was of a dark color and traveled slowly. About 4 o'clock in the afternoon of June 28 a man dressed in dark clothes and hat was observed at the mouth of Maiden canyon on a dark horse proceeding along the road from the direction of Maiden in the general direction of the cabin of defendant. The road he was traveling turns east out of the road leading from Maiden to Giltedge through a deserted ranch, and theretofore had generally been used by defendant to reach his cabin from the direction of Maiden, though it was sometimes traveled by others, both on foot and on horseback. This witness was about 2,000 feet

from the horseman. He did not undertake to identify him, nor did he observe where he went. The deceased was the owner of some mining claims to the north or northwest of defendant's place, in or near what is called "Collar Gulch." In order to reach them, he would go from his cabin northward over the divide, and thence eastward in the direction in which the Ft. Maginnis road leads. On June 27 the defendant was seen by a witness named McIntyre hurrying on foot from the direction of Collar Gulch toward his home. When he saw the witness approaching him, according to the statement of the witness, he got off the road into the brush. He was carrying a shotgun. The same witness stated that he had seen defendant frequently there before that day. He also saw him on horseback near the same place afterward but he then had no weapon. In September, 1909, the defendant procured the arrest of deceased in peace proceedings. The deceased could not furnish bond, and was detained in jail thereafter in default of bond, until March 7, 1910, when he was released. The nature of the difficulty between the defendant and deceased does not appear. On June 10, 1910, the defendant had a conversation with a witness near Giltedge. He inquired of witness whether the deceased had been trying to obtain from the sheriff some hounds, and why he wanted them. The witness replied that the deceased was afraid of defendant, and wanted the hounds to protect him at night. Defendant then said: "The d—— fool. If I wanted him, I could get him without going to the cabin." He also remarked that the deceased was getting crazy because he himself had had a conversation with him, and that he had said that he would not fight because he was under bonds, but that when the time was up he would settle with defendant. On June 29, in a saloon at Giltedge, he invited several persons present there to drink, remarking: "Well, come on boys. Might as well have a drink. I have only got sixty days more to live, and Burke is going to kill me." He stated to a witness at Giltedge a day or two afterward that he expected to be arrested upon a charge of murdering deceased, the witness having told him about the evidence which had been gathered against him. Several witnesses testified that the recoil

of a shotgun upon a discharge of buckshot is much greater than from a discharge of small shot, resulting frequently in a bruise upon the muscles of the arm and shoulder. On July 11 the person of defendant was examined by the sheriff at the jail in Lewistown. A discoloration like a healing bruise was found on the muscle of his right shoulder. Defendant was in the habit of shooting from his right shoulder. On July 7 the defendant's saddle-horse was examined by the sheriff and others. His legs were chafed and sore. In the opinion of one witness this condition was due to his "fighting hobbles," which the defendant had put upon him some two or three weeks before.

The foregoing is gathered from the statements of witnesses introduced by the state. The defendant offered himself as a witness. He did not controvert seriously any statement of fact made by any witness, except that he denied that he had made any inquiry about buckshot or had purchased any at the time or place mentioned by any of them, or elsewhere, and also that there was any mark or bruise upon his shoulder. He admitted that he had purchased buckshot, but not within two or three years. He admitted, or did not deny, the conversations had with several witnesses about the deceased and also with the sheriff at the time of his arrest. He offered the explanation, however, that he had heard he was suspected of the murder because of the strained relations existing between him and the deceased. He stated that he was present at his home during the whole day of June 28, engaged in making preparations for hay harvest, explaining that he did not give the sheriff a definite answer at the time of his arrest by saying that he did not then remember his whereabouts, but that, after thinking over the matter, he had become satisfied that he had not left his place on that day, stating particularly what he was doing. It appears from his own testimony and that of other witnesses examined in his behalf, and upon this point there is no controversy, that he was in the habit almost daily of looking over the range for his cattle which ranged mainly to the north of Maiden and the Spotted Horse and Cumberland mines, and that it was not an unusual thing for him to walk. He usually carried a gun of some sort to shoot coyotes,

which killed many of his calves. He stated that he preferred to walk because it hurt him to ride. Touching the shells found about the cabin, he stated that he had had no loaded shells for some time; that he knew nothing about the remnant of the shell found in the stove; that he sometimes changed shot in shells from smaller to a larger size; that he would pick up and preserve for use in this connection wads when he found them dropped about the place as he fired his gun from time to time, but that he did not reload any shells. He explains the presence of the remnant of the shell in the stove by saying that he was in the habit of raking up chips where he chopped his wood, using them to light his fire, and that he had probably at some time accidentally gathered with them an exploded shell. He admitted that he had seen McIntyre near the mouth of Collar Gulch on June 27. He denied, however, that he had left the road to avoid a meeting, and said he had taken a cut-off trail leading through the brush to his home by a shorter route. It appears from McIntyre's own statement that the two were not on friendly terms. He testified that he did not own a light shirt at all, and never wore one. The evidence is silent as to whether such a garment was found in his cabin. He was in Lewistown on June 14 and 15. It appears from his own statement and those of several other witnesses that he was then clean shaven. He denied that he was at the store of the Judith Hardware Company at all while he was in Lewistown. His saddle-horse was shown to be very gentle, requiring neither hobbles nor picket rope because it would permit anyone to approach it. The condition of its legs when seen by the sheriff was accounted for by the statement that on July 4 there had been a severe hail-storm, and that in drifting before the storm the horse had run into a barb-wire fence, and hurt himself. He stated that he did not know anything about the whereabouts of the deceased on June 28 or anything of the discovery of the Hertford claim, other than what he had heard in the testimony of witnesses at the trial. At the time of the homicide he was fifty-nine years of age. He had been a resident of Fergus county since 1881, and had resided where he now lives for ten years. One other item of evidence which we omitted to state in

its proper place we add here. The physician who examined the body of deceased on July 30 stated that in his opinion death had occurred from twenty-four to forty-eight hours prior to the examination.

In summarizing the evidence we have observed the rule that every conflict in the statements of witnesses as to any material fact must be resolved in favor of the finding of the jury. That the deceased was foully murdered on the afternoon of the day he was seen going to his work at the Hertford claim, there is no room for doubt. Do the circumstances point out the defendant as the murderer so clearly as to exclude all reasonable doubt of his guilt? This question must be answered in the negative, unless the circumstances can bear the test required by the rule applicable to cases where a conviction is sought upon circumstantial evidence, to-wit: That all the circumstances proved must be consistent with each other and with the hypothesis that the accused [1] is guilty, and at the same time inconsistent with any other rational hypothesis. (*State v. Allen*, 34 Mont. 403, 87 Pac. 177; *State v. Northern Pacific Ry. Co.*, 41 Mont. 557, 111 Pac. 141; *Smith v. State*, 61 Neb. 296, 85 N. W. 49; *Lancaster v. State*, 91 Tenn. 267, 18 S. W. 777; *State v. Asbell*, 57 Kan. 398, 46 Pac. 770; *Bryant v. State*, 116 Ala. 445, 23 South. 40; 12 Cyc. 488.)

The theory of counsel for the state is that the defendant, being on unfriendly terms with the deceased, crept upon him while he was at work, and shot him, having previously extracted a charge of birdshot from a Peter's Ideal shell, and replaced it with buckshot specially for this purpose. This inference they draw from circumstances which they insist are fully established, viz.: That the defendant had buckshot in his possession on June 15; that exploded Peter's Ideal shells were found about his cabin; that such wads as are used in loading them were found near the body of the deceased; that there were on one of these impressions of buckshot and upon the other of smaller shot; that the burned butt of such a shell was found in the ashes of defendant's stove, bearing indications that it had been exploded by defendant's gun; that a loose wad and two remnants were found in the cabin; that the gun had recently been fired, and that streaks in the bore

indicated that the last charge fired from it consisted of buckshot; that several days afterward the shoulder of defendant was bruised as if by the recoil of a gun, and that he was seen to go toward the Hertford claim on the morning of the day of the murder, and late in the afternoon was seen returning to his home from that direction. Of course, if all of these facts were clearly established, there would be ground for the conclusion reached by the jury; but when we subject the evidence to analysis it is not sufficient, to say the most, to warrant any conclusion other than that there is a strong suspicion that the defendant is guilty. No attempt was made by the witness who saw the man ascending the wall of the canyon toward the place of the homicide to identify him as the defendant. The facts observed as to the clothing and movements of this man do not tend to identify him as the defendant. He was then only a few hundred feet away from the Hertford claim. If he was the assassin, he was at that time evidently on his way to the place of his intended crime, in plain view of any person who happened to be on the road or about the mines to the north. Moreover, he must have remained in the vicinity for about four hours lying in wait. He was on foot, wearing a light shirt, evidently in his shirt sleeves, while the unidentified man seen going toward defendant's home in the afternoon was dressed in dark clothes and was on horseback. It may be noted here, also, that the witness who observed this man failed to state whether he had a weapon. From the presence of the horse and man tracks leading away from near where the body lay, and the faint trail found in the park to the west of the canyon road, counsel insist, also, that the inference should be drawn that the defendant, having come on horseback, hobbled his horse in the park, and went up on foot to the Hertford claim from the west. Assuming that the person seen in each instance was the defendant, we have him appearing first from the north on foot, without any effort of concealment, and then from the west with every effort to avoid being seen. In the meantime he had changed his clothes and obtained a horse. These circumstances, shown to furnish a basis for the inference that the defendant was in proximity to the place about the time the crime

was committed, are inconsistent with each other. If the identification had been made by substantial evidence in either case, then the burden might have been upon the defendant to offer evidence to explain his presence there at that time. As it is, there is no basis in this feature of the evidence for the conclusion that the defendant's statement that he was at home during the whole of June 28 is untrue.

Nor do we think that, if it be assumed that the defendant purchased buckshot in Lewistown on June 15, the finding of the gun wads near the body, though they bore the marks they did, should impel a reasonable person to the conclusion that defendant fired the shot. It is not specially significant that exploded shells were found about his cabin. Such as were found had been exploded long before June 28. It is not likely that having in his possession a single unused shell and at the same time other weapons which would have answered his purpose just as well, together with an ample supply of ammunition for them, he went to the trouble of loading it with buckshot in order to commit the murder, and then taking the precaution to conceal it by burning in the stove. It is true that this may have been done, but that it was done is a speculative conclusion, rather than a legitimate inference to be drawn from the facts established by the evidence.

The testimony of the salesman as to the identity of the man who purchased the shot on June 15 is exceedingly vague and indefinite. He stated substantially that he could not say whether the defendant was the same man, and, though he afterward said that according to his best judgment he was, the features by which he fixed the identity at the trial differed substantially from those upon which recognition was based at the coroner's inquest. So that, though the testimony of Langdoc be accepted as true, as to the conversation had with defendant on the evening of June 14, the conclusion that the defendant was the purchaser rests upon very unsubstantial evidence. The same may be said of the streaks observed in the bore of the gun.

So, too, the evidence relied on to supply the motive for the murder is of little, if any, criminatory value. The fact that the defendant had the deceased arrested and confined in peace pro-

ceedings of itself tends to show the absence of motive. By this act he demonstrated that at that time he was not disposed to take the law in his own hands. He proceeded under the statute to prevent the deceased from carrying out threats of violence which he had evidently theretofore made. (Rev. Codes, sec. 8941 *et seq.*) This would seem to indicate a disposition on his part not to offer the deceased any personal violence. There is not a syllable of evidence tending to show animosity retained by the defendant toward the deceased, nor that the defendant at any time made any threats or expressed any ill-will toward him, nor that he feared personal violence from the deceased after his release from jail. What motive, then, prompted the defendant to commit the crime? This inquiry cannot be answered from the [2] evidence. It is not indispensable that a motive be shown if the facts otherwise tend to show that the crime has been committed; but its presence or absence is always more or less significant in the light of the facts of the particular case. (*State v. Lucey*, 24 Mont. 295, 61 Pac. 994.) The absence of it is of special significance in a case like the present, where the conclusion of guilt, if sustained at all, must be sustained upon the statements of witnesses the truth of which is in many instances doubtful, and remote inferences the correctness of which is open to serious question.

The conversations had with the sheriff at the time of the arrest [3] and a few days before with another witness at Giltedge are not, in view of the circumstances, to be construed as implied admissions of guilt. Before the defendant made the statement attributed to him at Giltedge, the witness had told him of the evidence obtained against him, and that he was suspected. Evidently the defendant had this in mind at the time he was arrested, and hence the question to the sheriff as to the amount of evidence the authorities had against him. Nor, in view of the habits of defendant, is any weight to be attached to the testimony of McIntyre as tending to show that defendant was lying in wait for deceased in the neighborhood of Collar Gulch on June 27.

Assuming that the shoulder of defendant bore the mark of a healing bruise at the time of his arrest, it is not reasonable to suppose that a single discharge of an ordinary sportsman's shell, even though loaded with buckshot, would produce such an effect. This is contrary to common experience. But, assuming this to be true, the fact that the bruise was there is as consistent with the notion that it was produced by some other cause as it is that it was produced by the shot that killed deceased. The conversation had with a witness in relation to deceased and the hounds conveys the idea that the defendant had no fear of deceased, nor at that time any present intention of hunting him up in order to have a personal encounter with him. The evidence wholly fails to show that the defendant had any knowledge of the location of the Hertford claim or that the deceased was at work there at the time of his death.

Viewed separately, most of the circumstances adverted to are [4] as consistent with the notion that defendant is innocent as they are with the hypothesis that he is guilty. Taken altogether, they do not exclude the hypothesis of his innocence, but, as already said, only go so far as to induce the conclusion that he is probably guilty. This is not sufficient to justify a conviction. In *State v. McCarthy*, 36 Mont. 226, 92 Pac. 521, this court said: "There must be some substantive testimony to justify the judgment of a court. * * * Mere suspicions or probabilities, however strong, are not sufficient basis for a conviction of crime." (See, also, *State v. Foster*, 26 Mont. 71, 66 Pac. 565; *State v. Duncan*, 40 Mont. 531, 107 Pac. 510.)

This conclusion renders it unnecessary to consider the second contention made by counsel.

The judgment and order are reversed, with directions to grant the defendant a new trial.

Reversed and remanded.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
MARCH TERM, 1911.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH,

THE HON. WILLIAM L. HOLLOWAY,

} Associate Justices.

STATE, RESPONDENT, *v.* CREAN, APPELLANT.

(No. 2,890.)

(Submitted March 6, 1911. Decided March 13, 1911.)

[114 Pac. 603.]

Criminal Law—Homicide—Information—Sufficiency—Manslaughter—Variance—Evidence—Burden of Proof—Instructions—Presumption of Innocence—Dying Declarations—Admissibility—Hearsay—Appeal.

Homicide—Information—Sufficiency.

1. An information stating that defendant unlawfully, feloniously, willfully, premeditatedly, deliberately and of his malice aforethought shot and killed E. M., a human being, sufficiently charged murder.

Same—Manslaughter—Information—Sufficiency.

2. *Held*, that the information referred to in paragraph 1 above, when stripped of the terms conveying the idea of deliberation, premeditation and malice, sufficiently charged manslaughter, and that therefore the jury could properly find accused guilty of the lesser offense, under section 9326, Revised Codes.

Homicide—Pleading and Proof—Variance—Surplusage.

3. The information charged that defendant shot the deceased, and that the latter died, in J. county. The evidence disclosed that while the shooting occurred in J. county, the deceased died in a neighboring one. *Held*, that the jurisdiction of the offense having been properly laid in

J. county (Rev. Codes, sec. 9020), it was unnecessary to allege or prove that deceased died in that county; that such allegation was surplusage, and that therefore, there was not any variance.

Criminal Law—Variance—What Constitutes.

4. A variance in criminal law refers to a disagreement between the allegations in the information and the proof, with reference to some matter which is legally essential to the charge.

Same—Reasonable Doubt—Correct Instruction.

5. An instruction on the question of reasonable doubt, substantially the same as that approved in *Territory v. McAndrews*, 3 Mont. 158, *held* not open to objection.

Same—Instructions—Reasonable Doubt.

6. The paragraph in an instruction on reasonable doubt, that "a juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjecture, as to a possible state of facts different from that established," *held* simply an admonition that jurors could not go outside of the evidence introduced, in search of something upon which to base a reasonable doubt of defendant's guilt, and not to have been prejudicial to him.

Same—Justification—Quantum of Proof.

7. Where the commission of the homicide by the defendant was proved, the evidence on the part of the prosecution tending to show that the killing constituted murder, and the defense was that the killing was justifiable, an instruction that the burden of proving circumstances of justification lay upon defendant, the *quantum* of proof thus imposed upon him being only such, however, as upon the whole case would raise a reasonable doubt of his guilt, was correct.

Same—Instructions—Presumption of Innocence.

8. Under the rule that the refusal of an instruction is not error if the substance thereof was given in other paragraphs of the charge, the court's refusal of a tendered instruction that the presumption of innocence is a fundamental and important part of the law of the land, and should not at any stage of the trial be ignored, etc., was not erroneous.

Same—Dying Declarations—Preliminary Proof—Presence of Jury—Discretion.

9. Whether the trial court should or should not excuse the jury during the preliminary inquiry touching the admissibility of a dying declaration in evidence was a matter within its sound discretion, and in the absence of any showing of abuse thereof its ruling will not be disturbed on appeal.

Same—Dying Declarations—Preliminary Proof—Sufficiency.

10. It is not necessary to the introduction of a dying declaration that it be first shown that the declarant was *in extremis*, by evidence independently of the declaration itself; it is sufficient if the evidence, whether given by the declarant or others, shows that it was made under a sense of impending death.

Same—Dying Declarations—Admissibility.

11. Statements of deceased in his dying declaration that the shooting was without provocation, that there was not any trouble between him and defendant, and that the declarant was not armed at the time he was shot, were not objectionable as conclusions, opinions or mere matters of belief, but were admissible in evidence as a part of the *res gestae*.

Hearsay Evidence—What Does not Constitute.

12. Where a witness could answer every question propounded to him of his own knowledge, and the value of his testimony did not depend

in any degree upon the veracity or competency of any other person, his answers were not objectionable as hearsay.

Homicide—Manslaughter—Theory of Case—Appeal.

13. Defendant was charged with murder in the first degree and convicted of manslaughter. He acquiesced in the theory of the case that there was evidence upon which a verdict of manslaughter might be predicated, and did not object to instructions defining manslaughter and distinguishing it from murder, and telling the jury, *inter alia*, that they might find defendant guilty of murder in either of its degrees, or manslaughter, etc. *Held*, that he was not in any position to complain that the jury did not find him guilty of a more serious offense, but was bound by the theory upon which the case was tried.

Criminal Law—Appeal—Extent of Review.

14. The supreme court will not interfere with a judgment of the district court in a criminal cause, unless the substantial rights of the defendant have been prejudicially affected.

Appeal from District Court, Jefferson County; Llew. L. Calaway, Judge.

CORNELIUS CREAN was convicted of manslaughter and appeals from the judgment and an order denying him a new trial. Affirmed.

Cause submitted on briefs of counsel.

Mr. J. E. Healy, and Mr. M. F. Canning, for Appellant.

Will a verdict of manslaughter be supported under the information? Counsel for defendant submit that it is well settled in Montana, and at common law, that under such an information as is set forth in *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182, a person may be convicted of manslaughter, or any assault, such as might be alleged therein. We concede this proposition, and urge it as the basis of our argument. Is the form used in the information in this case a substitute for a common-law indictment for murder? This form of information has been used in California, and has been sustained in that state as charging murder. (*People v. Hyndman*, 99 Cal. 1, 33 Pac. 782.) But this form is subject, we submit, to all the limitations and restrictions which go with the rules relating to charging crimes in the language of the statute. (See *McGinniss v. State*, 16 Wyo. 72, 91 Pac. 939.)

That manslaughter under our law is not included in the crime of murder, see *State v. Johnson*, 23 N. C. 354, 35 Am. Dec. 742, where it was said: "There can be no such thing in law as a killing with malice, and also upon the *furor brevis* of passion; and provocation furnishes no extenuation, unless it produces passion. Malice excludes passion; passion presupposes the absence of malice. In law they cannot coexist." This language was quoted with approval in the case of *State v. Sloan*, 22 Mont. 293, 56 Pac. 367, and the rule thus laid down applies to voluntary and not to involuntary manslaughter. The information herein, being a legal definition of the crime of murder and nothing more, cannot therefore include the further meaning that it contains a crime which is separately defined and which "cannot coexist" with it. In some of the states there is a specific statute which especially says that manslaughter is included within murder, or at least uses language similar to our statute defining assault in the third degree. (See *Smith v. Territory*, 14 Okl. 162, 77 Pac. 188.) We have no such statute in Montana. Section 9326, Revised Codes, is the only one upon which the prosecution can expect to justify the verdict of manslaughter in this case. But we submit that the words "necessarily included" therein found cannot be read or made to reach, so far as to say that an offense which cannot coexist with murder is either included—or necessarily included—within the legal charge of murder in the language of the statute. If the facts were set up, as at common law, then the offense would be included—necessarily included.

In the first part of the paragraph of the charge relating to reasonable doubt, the jurors were told that the reasonable doubt, the existence of which, in their minds, should lead them to acquit the defendant, should so exist in their minds as jurors, while in the last paragraph they were practically told that they might consider the case as men, and that their oaths as jurors added nothing to their duties. This, of itself, we think both confusing and erroneous. (*Adams v. State*, 34 Fla. 185, 15 South. 905 (909); *Thomas v. State*, 74 Ark. 431, 86 S. W. 404; *Siberry v. State*, 133 Ind. 677, 33 N. E. 681 (685); *Lillie v. State*, 72 Neb. 228, 100 N. W. 316 (322).)

A declaration cannot be admitted as a dying declaration unless it be shown in some manner that deceased was conscious of approaching death. (*Brennan v. People*, 37 Colo. 256, 86 Pac. 79; *Fuqua v. Commonwealth*, 24 Ky. Law Rep. 2204, 73 S. W. 782; *State v. Vaughan*, 152 Mo. 73, 53 S. W. 420; *Lyles v. State*, 48 Tex. Cr. 119, 86 S. W. 763; *State v. Daniels*, 115 La. 59, 38 South. 894; *State v. Gay*, 18 Mont. 51, 44 Pac. 411.) Dying declarations, consisting of conclusions, opinions and beliefs, which would not be received if the declarant were a witness, are not admissible. (10 Ency. of Law, 2d ed., 377; *State v. O'Shea*, 60 Kan. 772, 57 Pac. 970; *Jones v. Commonwealth*, 20 Ky. Law Rep. 335, 46 S. W. 217; *Berry v. State*, 63 Ark. 382, 38 S. W. 1938; *Jones v. State*, 79 Miss. 309, 30 South. 759; *Williams v. State*, 40 Tex. Cr. 497, 51 S. W. 220; *State v. Burnett*, 47 W. Va. 731, 35 S. E. 983.)

Mr. Albert J. Galen, Attorney General, and *Mr. J. A. Poore*, Assistant Attorney General, for Respondent.

Will the verdict of manslaughter be supported under the information? Under the provisions of section 9326, Revised Codes, the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense. While it is true that manslaughter is not a degree of murder, yet the offense is necessarily included in the charge of murder, and if the information is sufficient to sustain a charge of murder, it will support a verdict of manslaughter. (*People v. Muhlner*, 115 Cal. 303, 47 Pac. 128; *People v. McFarlane*, 138 Cal. 481, 71 Pac. 569, 72 Pac. 48, 61 L. R. A. 245.) There is no doubt but what the information is sufficient to sustain a verdict of murder, and this is not questioned by appellant. Allegations sufficient for a common-law indictment for murder are sufficient for an information under the statute. (*State v. McGowan*, 36 Mont. 428, 93 Pac. 552; *State v. Lu Sing*, 34 Mont. 31, 85 Pac. 521, 9 Ann. Cas. 344.)

The jury were correctly instructed as to murder in the first degree, murder in the second degree and manslaughter; and they

were also instructed that if the evidence, under the instructions of the court, would warrant or require it, they might find defendant guilty of murder in the first or second degree or manslaughter, or not guilty, to which instruction no exception was taken or objection made by defendant. The jury were the judges of the evidence, and were correctly informed of the law, and it was for them to decide of what offense, if any, the defendant was guilty. The evidence at least warranted a verdict of manslaughter, and the information will support the verdict.

The instruction on reasonable doubt is practically the same instruction on reasonable doubt given in the case of *Territory v. McAndrews*, 3 Mont. 162, and upheld by this court as correctly stating the law. (*State v. Gleim*, 17 Mont. 31, 52 Am. St. Rep. 655, 41 Pac. 998, 81 L. R. A. 298; *State v. Martin*, 29 Mont. 281, 74 Pac. 725; *State v. Harrison*, 23 Mont. 79, 57 Pac. 647; *State v. De Lea*, 36 Mont. 531, 93 Pac. 814.) The cases cited by appellant in support of his objection are not in point, for the reason that the instruction on reasonable doubt considered in those cases in effect placed the burden on the defendant to furnish to the jury reasons for his acquittal, instead of giving him the benefit of presumption of innocence. The instruction in the case at bar is open to no such objection.

As to whether or not the dying declaration in question here was made under a sense of impending death, in order to be admissible, is a question of fact for the court. (*State v. Roberts*, 28 Nev. 350, 82 Pac. 100; *State v. Byrd*, 41 Mont. 604, 111 Pac. 407; 21 Cyc. 986.) And the court had a right to determine this from all the surrounding facts and circumstances as well as from the declaration itself. (*State v. Byrd, supra*; 2 Wigmore on Evidence, sec. 1442; 4 Ency. of Ev. 957.)

Dying declarations which have been reduced to writing by a competent person at the instance of the declarant, or with his consent, and which have been approved and signed by him, may be proved by such writing. (4 Ency. of Ev. 1008; *State v. Kindle*, 47 Ohio St. 358, 24 N. E. 485; *King v. State*, 91 Tenn. 617, 20 S. W. 169; *Turner v. State*, 89 Tenn. 547, 15 S. W. 838.) Upon the question of the admissibility of a dying declaration, the

appellate court will not reverse the decision of the trial court unless it is clearly erroneous, and will merely inquire whether or not there is some evidence to support such a decision. (4 Ency. of Ev. 890, and cases cited.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The defendant was charged by an information with the crime of murder in the first degree, convicted of manslaughter, and has appealed from the judgment and from an order denying him a new trial.

1. The first assignment argued in the brief of counsel for appellant is that the information does not support the judgment. [1] Briefly paraphrased, the information charges that the defendant unlawfully, feloniously, willfully, premeditatedly, deliberately and of his malice aforethought shot and killed Emil Martilla, a human being. This sufficiently charges murder as defined in section 8290, Revised Codes. (*State v. Hliboka*, 31 Mont. 455, 78 Pac. 965.)

But it is urged that manslaughter is not necessarily or at all included in the crime of murder under our Code, and that section 9326, Revised Codes, cannot apply to a case of this character. The test to be applied under statutes similar to the last one mentioned above is: Does an information in describing the greater offense necessarily contain all the essential elements of an information for the lesser? "Murder is the unlawful killing of a human being, with malice aforethought." (Section 8290.) "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing * * * is murder of the first degree," etc. (Section 8292.) "Manslaughter is the unlawful killing of a human being without malice. * * *" (Section 8295.) The information before us clearly charges the unlawful killing of a [2] human being, and stripped of the terms used to convey the idea of deliberation, premeditation, and malice, sufficiently charges manslaughter. That murder in the first degree, as defined in our Code, necessarily includes manslaughter, is recog-

nized generally. (*State v. Nielson*, 38 Mont. 451, 100 Pac. 229; *Pigg v. State*, 145 Ind. 560, 43 N. E. 309; *People v. Dolan*, 9 Cal. 576; *People v. Muhlner*, 115 Cal. 303, 47 Pac. 128; 22 Cyc. 469.)

2. Concerning Martilla, a witness for the state was asked: "What time did he die?" An objection by counsel for the defendant was overruled. The evidence showed that Martilla was shot at Comet, in Jefferson county, but died in Silver Bow county. The information charges that he was shot and that he died in Jefferson county; and it is claimed that there is a material variance between the pleading and proof. While the objection to the question asked does not raise the question of variance, yet, assuming that it does, there is not any merit in the contention made. Section 9020, Revised Codes, provides: "The jurisdiction of a criminal action for murder or manslaughter, when the injury which caused the death was inflicted in one county, and the party [3] injured dies in another county, or out of the state, is in the county in which the injury is inflicted." Having properly laid the jurisdiction of the offense in the county where the fatal shot was fired, it was unnecessary to allege where the deceased died, and the allegation that he died in Jefferson county may be disregarded as surplusage. A variance within the meaning of the [4] term as applied to criminal law refers to a disagreement between the allegations in the information and the proof, with reference to some matter which is legally essential to the charge. (22 Cyc. 450.)

3. Instruction 32, given by the court, cannot be commended; but, generally speaking, it is in substance the same as the [5] definition of reasonable doubt given in *Commonwealth v. Webster*, 5 Cush. 320, 52 Am. Dec. 711, approved in *Territory v. McAndrews*, 3 Mont. 158, and followed in many later cases. One paragraph in the instruction is criticised as assuming a fact in dispute. It follows: "A juror is not allowed to create sources [6] or materials of doubt by resorting to trivial and fanciful suppositions and remote conjecture, as to a possible state of facts different from that established by the evidence." It seems to us, however, plain enough that by this instruction the court meant merely to remind the jurors that they could not go outside of

the evidence introduced in search of something upon which to base a reasonable doubt of defendant's guilt, and that the jurors must have so understood.

4. In instruction 33 the court gave section 9282, Revised Codes, as follows: "Upon a trial for murder, the commission of the homicide by the defendant being proven, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof *on the part of the prosecution* tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." And this was followed by instruction 34, which reads: "As to the amount of evidence necessary to be introduced by the defendant so as in law to mitigate, excuse, or justify the homicide, you are instructed it must be at least sufficient to create in the minds of the jury, upon a consideration of all the evidence in the case, a reasonable doubt." It is urged that in instruction 34 the court in effect told the jury that the burden of proof was upon the defendant. The commission of the homicide by the defendant [7] was proved; in fact, it was tacitly admitted at least by the defendant himself. The defense sought to be made was that the killing was justifiable. The evidence on the part of the prosecution tended to show that the killing amounted to murder. Therefore, under section 9282 above, the burden was upon the defendant to prove circumstances of mitigation or that justified or excused the killing (*Territory v. McAndrews*, above), and in instruction 34 the court correctly told the jury that the *quantum* of proof thus imposed upon the defendant was such only as upon the whole case made would raise a reasonable doubt of his guilt. (*People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549; 21 Cyc. 1014, and cases cited.)

5. At the trial defendant tendered his instruction No. 5, as follows: "You are instructed that the presumption of innocence is not an idle form. It is a fundamental and important part of the law of the land, and should not at any stage of your investigations be lost sight of or ignored; and, unless your minds are convinced of defendant's guilt to a moral certainty, and to the exclusion of all reasonable doubt as to his innocence from all the

evidence adduced in this case and considered by you, as well as that of the defense, you must find the defendant not guilty." The instruction was refused, and error is predicated upon the ruling. In instruction No. 2, given, the court charged: "No presumption is raised by the law against him [defendant], but every presumption of law is in favor of his innocence, and in order to convict him of the crime charged against him, or of any lesser offense included therein, every material fact necessary to constitute such crime, or any lesser offense included therein, must be proven by the state by competent evidence beyond a reasonable doubt; and if the jury entertain a reasonable doubt upon any fact or element necessary to constitute the crime charged, or any lesser offense included therein, it is your duty to give the prisoner the benefit of such doubt and acquit him." We think this instruction fully covers the subject matter of defendant's requested instruction No. 5 above. "It is not error to refuse to give [8] instructions asked for, however correct or applicable, if they have in substance already been given in the charge of the court." (*Territory v. McAndrews*, 3 Mont. 158; *State v. Martin*, 29 Mont. 273, 74 Pac. 725.)

6. Upon the trial, the dying declaration of deceased was offered in evidence. Counsel for the defendant requested the court to excuse the jury pending a determination as to the admissibility of the declaration. This the court refused to do. Whether the [9] jury should or should not be excused during the preliminary inquiry was a matter entirely within the sound discretion of the trial court, and, in the absence of any showing of abuse of that discretion, the ruling will be affirmed. (5 Wigmore on Evidence, p. 137; 21 Cyc. 985.) It is urged, however, that the declaration was inadmissible, (1) because there was no preliminary proof that deceased at the time of making it was *in articulo mortis*; and (2) that the declaration itself does not show that the deceased had abandoned all hope of recovery. Prior to offering the declaration, the state had shown that Martilla's wound was such that it would necessarily be fatal; that the declaration was made on July 30; that Martilla died on August 2; that the declaration was made in the presence of the county

attorney of Silver Bow county and other witnesses, was reduced to writing, read over to Martilla and signed by him. A part of the declaration reads as follows: "Q. Have you given up all hope of recovery? Have you given up all hope of getting well? You expect to die, do you? A. Oh, yes. Q. You don't think there is any chance for you to get well? A. No; I don't. Q. No chance at all? A. No. Q. Do you believe in a Supreme Being—in a God? Do you think you will have a hereafter? A. Yes, sir. * * * Q. And the statement you make is true, is it? A. Yes, sir. Q. You realize that you must tell the truth on an occasion of this kind, do you? A. Yes, sir; I tell the truth. Q. When you die, you expect, then, that you would be punished if you are not telling the truth—is that the idea? A. Yes, sir. Q. Has the doctor told you that you wouldn't live? A. Yes, sir; told me, and I know that. Q. You know it yourself, do you? A. Yes, sir."

It is not necessary to the introduction of a dying declaration that it be shown that the declarant was *in extremis* by evidence [10] independently of the declaration itself. (21 Cyc. 982.) In fact, it was formerly assumed that any evidence of the condition of the deceased, other than his own statement, was inadmissible; but the rule now is well settled that the party offering the evidence may avail himself of any means by which the declarant's condition can be shown; and if the evidence, whether given by the declarant or others, shows that the declaration was made under a sense of impending death, the object has been attained. (2 Wigmore on Evidence, sec. 1442.) The evidence in this instance meets the requirements of the rule, and was properly received. (*State v. Russell*, 13 Mont. 164, 32 Pac. 854; *State v. Gay*, 18 Mont. 51, 44 Pac. 411; *State v. Byrd*, 41 Mont. 585, 111 Pac. 407.)

After the written declaration was admitted as a whole, the defendant moved to strike out certain portions of it. The declaration as admitted consists of questions propounded by the county attorney and the answers thereto given by the deceased. Generally speaking, the motion to strike in each instance was based upon the contention that the matters referred to do not

relate to the cause of death. While section 7887, Revised Codes, provides that evidence may be given in criminal actions of the act or declaration of a dying person, made under a sense of [11] impending death, respecting the cause of his death, this is but declaratory of the common law, and has generally been held to be sufficiently broad to comprise the facts and circumstances of the killing, and such other facts and circumstances, immediately surrounding and attending it, as properly form a part of the *res gestæ*. (*Leiber v. Commonwealth*, 9 Bush (Ky.), 11; *White v. State*, 100 Ga. 659, 28 S. E. 423; 3 Rice on Evidence, 533; 21 Cyc. 974.) The argument in the brief is that the portions of the declaration sought to be stricken are the expression of opinion, or belief, or the conclusion of the declarant. Whether a mere opinion, conclusion, or belief of the declarant can or cannot be admitted as a part of a dying declaration we need not stop to consider, though a reference to 2 Wigmore on Evidence, section 1447, clearly shows the absurdity to which the courts have heretofore gone in excluding dying declarations. The portions of this statement to which this objection is directed contain the declarations, repeated in different forms, that the shooting was without provocation, that there was not any trouble between the deceased and the defendant, and that the deceased was not armed at the time of the shooting. Similar statements have been passed upon by the courts frequently, and are generally held to be statements of facts, and not conclusions, opinions, or mere matters of belief. (*Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22, 15 South. 264; *White v. State*, above; *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218, 5 N. E. 203; *Powers v. State*, 74 Miss. 777, 21 South. 657; *Wroe v. State*, 20 Ohio St. 460; *Blair v. State* (Okl. Cr.), 111 Pac. 1003; *State v. Saunders*, 14 Or. 300, 12 Pac. 441; *State v. Gile*, 8 Wash. 12, 35 Pac. 417.) We think the substance of this statement comes clearly within the rules announced above, and that the motions were properly denied.

7. Matt Kusola, a witness called by the state, testified that he was an eye-witness to the shooting, and detailed somewhat minutely the circumstances of the affray. The defendant called

witnesses, who testified that Kusola had stated to them out of court, in substance, that he did not see the shooting, and did not know who did it until informed afterward. In rebuttal the county attorney recalled Kusola and asked him these questions, each of which he answered in the affirmative: "Q. State to the court and jury whether or not you made any statement to me at the time, as to who did the shooting the night before. Q. Was the statement made by you to me on the morning of the 4th of July the same as testified to by you here concerning the shooting of the night of the 3d, when you were asked on the morning of the 4th of July by me about the shooting of the night before? Q. Did you tell me just the same as you testified here yesterday; did you tell the same facts or the same story; did you tell me the same as you told the jury?" To each question defendant's counsel objected on the ground that it called for hearsay evidence. Our Code (section 7862) provides: "A witness can testify to those facts only which he knows of his own knowledge," etc. "The term 'hearsay,' as used in the law of evidence, signifies all evidence which is not founded upon the personal knowledge of the witness from whom it is elicited, and which consequently does not depend wholly for its credibility and weight upon the confidence which the jury may have in him. Its value, if any, is measured by the credit to be given to some third person not sworn as a witness to that fact, and consequently not subject to cross-examination." (Underhill on Evidence, ed. 1894, p. 63.) "Hearsay denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person." (1 Greenleaf on Evidence, 15th ed., sec. 99.) The principal objections to this species of evidence are (1) that it is not given under oath—that is, that the person whose words are repeated was not under oath—and (2) that such person is not subject to cross-examination. That the evidence sought to be elicited by these questions was not hearsay is apparent enough. The witness could answer [12] every question of his own knowledge, and the value of the testimony given did not depend in any degree upon the veracity

or competency of any other person. However objectionable the evidence may have been upon other grounds, the trial court was required to pass upon the objection as made, and this court sits only as a court of review in this case. Upon the objection made the ruling was correct.

8. Finally, it is said that the evidence does not sustain the verdict, and the argument upon this assignment presents a somewhat unique problem. It is urged that there are two distinct theories of the shooting, and only two, disclosed by the evidence; that the testimony of the witnesses for the state shows a willful and deliberate murder; that of the witnesses for the defendant tends to show justifiable homicide. The jury returned a verdict for manslaughter; and it is now argued that, if the jury believed the state's witnesses, the verdict should have been for murder, while, if they believed defendant's witnesses, the verdict should have been not guilty. But in any event, it is said, there was not any evidence to justify a verdict for manslaughter. We are not prepared to agree altogether with this last statement. It is true that the evidence tending to show that the crime committed amounted to manslaughter only is slight; but the court in its instructions defined manslaughter, distinguished it from murder, and instructed the jury that they might find the defendant guilty of murder in the first degree, murder in the second degree, manslaughter, or they might return a verdict of not guilty. There was not any objection made to any of these instructions, and under our Code (section 9271) the defendant is bound by [13] them. He acquiesced in the theory of the case that there was evidence upon which a verdict of manslaughter might be predicated, and we do not think that he is now in a position to complain that the jury did not find him guilty of a more serious crime. But, to warrant this court in interfering, it must appear [14] that the substantial rights of the defendant have been injuriously affected. (Rev. Codes, secs. 9415, 9548; *State v. Gordon*, 35 Mont. 458, 90 Pac. 173; *State v. De Lea*, 36 Mont. 531, 93 Pac. 814; *State v. Byrd*, above.) The authorities which support the view that a defendant convicted of a lesser offense

cannot complain that the evidence shows a more serious crime will be found collected in *People v. Muhlnner*, above.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

**STATE EX REL. WORKING, APPELLANT, v. MAYOR ET AL.,
RESPONDENTS.**

(No. 2,951.)

(Submitted March 10, 1911. Decided March 15, 1911.)

[114 Pac. 777.]

**Constitution—Judicial Officers—Impeachment—Police Judges—
Removal—Written Charges—Prohibition.**

Constitution—Judges—Police Judge—Impeachment.

1. Constitution, Article V, section 17, providing that the governor and other state and judicial officers, except justices of the peace, shall be liable to impeachment, is only applicable to constitutional officers, and does not cover a city police judge, whose office is statutory only.

Same—Police Judges—Removal.

2. Revised Codes, section 3236, authorizing the city council to remove any officer on written charges after notice by a two-thirds vote of all the members elect, is in consonance with Constitution, Article V, section 18, subjecting officers not liable to impeachment to removal in the manner provided by law, and the statute is a proper exercise of the legislative authority granted, and a police judge of a city may be removed in a proper case by the city council.

Municipal Corporations—Officers—Removal—Written Charges.

3. Under Revised Codes, section 3236, providing for the removal by a city council of officers on written charges entered on their journal, written charges for the removal of an officer must be filed with the city council, and a proceeding for the removal of an officer has not been instituted until such charges are filed.

Prohibition—When Writ Does not Lie.

4. Prohibition does not lie at the suit of a police judge of a city to prohibit the city council from proceeding to remove him from office, where written charges have not been filed as required by Revised Codes, section 3236.

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

APPLICATION for writ of prohibition by the state, on the relation of Lincoln Working, police judge, against the mayor and city council of the city of Helena. From a judgment against relator, he appeals. Affirmed.

Mr. E. A. Carleton submitted a brief in behalf of Appellant, and argued the cause orally.

Mr. Edward Horsky, appearing in behalf of Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE SMITH delivered the opinion of the court.

The relator filed his affidavit in the district court of Lewis and Clark county, setting forth: That he is the police judge of the city of Helena; that on the tenth day of December, 1910, the city council "passed an order or resolution," as follows:

"Office of City Clerk, City of Helena.

"Helena, Montana, October 11, 1910.

"Mr. Lincoln Working, Police Judge, City Hall Building, City.

"Dear Sir: By order of the city council, I was instructed to notify you that the city council has requested your resignation as Police Judge of the city of Helena, next Monday night to be considered at an executive session of said council or show cause why the office of Police Judge should not be declared vacant on account of alleged incompetency.

"Yours truly,

"J. A. MATTSON,
"City Clerk."

That on the eleventh day of October, 1910, the "order" was served upon him. The affidavit then recites that the mayor and city council are threatening to, and will, proceed to try him "upon the matters in the aforesaid communication set forth, and to declare his office vacant," unless they are prohibited from so doing. An alternative writ of prohibition was issued by the court below, to which the respondents filed a general demurrer and a motion to quash. The court sustained the demurrer and

also the motion. Relator refused to amend, and judgment was entered against him. From that judgment an appeal is taken. We state our conclusions as follows:

1. Section 17 of Article V of the state Constitution provides that the governor and other state and judicial officers, except justices of the peace, shall be liable to impeachment for high crimes and misdemeanors, or malfeasance in office. Section 1 of Article VIII provides that the judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, and such other inferior courts as the legislative assembly may establish in any incorporated city or town. A police judge is not a [1] constitutional officer. His office is created by the legislative assembly, and not by the Constitution. Section 17 of Article V, *supra*, providing what officers shall be liable to impeachment, applies to constitutional officers alone. Therefore a police judge is not liable to impeachment.

2. Section 18 of Article V of the Constitution provides that all officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law. The provisions of the Constitution are both mandatory and prohibitory unless by express words they are declared to be otherwise. (Sec. 29, Art. III.) Section 3236, Revised Codes, relating to the government of cities, provides that the city council, upon written charges, to be entered upon their journal, after notice to the party and after trial by the council, by vote of two-thirds of all the members elect, may remove any officer. This section is in consonance with section [2] 18 of Article V of the Constitution, *supra*, and we think is a proper exercise of the legislative authority therein granted. It is admitted that the relator is a city officer; therefore he may, in a proper case, be removed by the city council.

3. But section 3236, Revised Codes, *supra*, expressly provides that such removal can only be made after written charges have been filed and entered upon the council journal. There is nothing in the record to indicate that any written charges have ever been filed against the relator, and, in fact, as we understand the

argument of counsel, it is admitted that no such charges have ever been filed. Section 6513, Revised Codes, provides that civil actions in the courts of record in this state are commenced by filing a complaint. By analogy it seems clear that the only method of commencing any action or special proceeding is by filing with the proper tribunal a complaint, or other document in the nature of a pleading, in order to give the court jurisdiction of the subject matter. (See *Bailey v. Examining Board*, 42 Mont. 216, 112 Pac. 69.) Until a complaint is filed in a civil action, no action is commenced or can be pending. Until written [3] charges are filed with a city council, no proceeding looking to the removal of a city officer has been instituted. The supreme court of West Virginia in the case of *Haldeman v. Davis*, 28 W. Va. 324, said this: "In order to authorize the writ [of prohibition], the petition must clearly show that the inferior tribunal is about to proceed in a matter over which it has no jurisdiction. * * * It can only operate upon a pending suit or proceeding, and cannot be used to prevent the institution of an action or proceeding. Nor will it lie to restrain an inferior court from exercising jurisdiction in a particular case if such court has jurisdiction in any case of that kind, for the remedy in such case is an appeal or writ of error." (See, also, *Sherlock v. City of Jacksonville*, 17 Fla. 93; 23 Cyc. 197.)

As no proceedings are pending against the relator, the district court was quite right in sustaining a demurrer to his affidavit and quashing the same.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied April 3, 1911.

MONSON, ADMINISTRATRIX, APPELLANT, v. LA FRANCE COPPER CO., RESPONDENT.

(No. 2,933.)

(Submitted March 7, 1911. Decided March 22, 1911.)

[114 Pac. 779.]

Personal Injuries in Mines—Master and Servant—Assumption of Risks—Instructions—New Trial—Discretion.

New Trial—Affirmance of Order, When.

1. Where the district court in granting a new trial does so in an order general in terms, its action will be affirmed if it can be justified upon any one or more of the grounds assigned in the motion.

Same.

2. The supreme court will not interfere with an order granting a new trial in a personal injury action, one ground of the motion for which was insufficiency of the evidence to support the verdict in favor of plaintiff, where the evidence was in direct conflict as to the cause of the injury. If the court under such conditions is dissatisfied with the verdict it is its duty, in the exercise of its legal discretion, to grant a retrial.

Personal Injuries—Assumption of Risk—Question for Court or Jury, When.

3. Where reasonable, fair-minded men might draw different conclusions from the evidence as to whether a servant assumed the risk of his employment, the question is properly one for the jury; if, however, it furnishes ground for but one inference, the question is one of law for the court's determination.

Same—Statutes—Violation by Master—Assumption of Risk—When Question not Involved.

4. The defense of assumption of risk is available to the master even though the negligence alleged was in violation of a duty imposed by statute; where, however, at the time of the injury of plaintiff's intestate he was so situated (in a deep mining shaft) as to have no choice of means of egress other than that provided by the master, and in the use of which he was killed (a mining cage from which the doors were missing, contrary to the provisions of section 8536, Revised Codes), he will be presumed to have submitted to its use from necessity, and therefore not to have assumed the attendant risk. The refusal of an instruction on that defense, under such circumstances, was not error.

Appeal from District Court, Silver Bow County; John B. McClellan, Judge.

ACTION by Sadie A. Monson, administratrix of John Monson, deceased, against the La France Copper Company. From an order granting a new trial after judgment for plaintiff, she appeals. Affirmed.

In behalf of Appellant, there was a brief by *Messrs. Breen & Hovevoll*. *Mr. H. K. Jones* argued the cause orally.

Messrs. Gunn & Hall, for Respondent, submitted a brief. *Mr. E. M. Hall* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On former appeals in this cause the defendant was awarded a new trial on the ground that the evidence was insufficient to show that its negligence was the efficient cause of the death of Monson, plaintiff's intestate. (*Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243.) This trial, had upon the same pleadings, resulted in a judgment for plaintiff. The defendant thereupon moved for a new trial, alleging as grounds therefor insufficiency of the evidence to justify the verdict, and errors occurring during the trial by which defendant suffered prejudice. The court made a general order sustaining the motion. Plaintiff has appealed. Under [1] the rule uniformly observed by this court, the defendant is entitled to an affirmance of the order, if it can be justified upon any one or more of the grounds assigned in the motion. (*State v. Schnepel*, 23 Mont. 523, 59 Pac. 927; *Welch v. Nichols*, 41 Mont. 435, 110 Pac. 89.)

By reference to the statement in the opinion delivered on the former appeals, it will be found that the negligence alleged was the omission by the defendant of the duty imposed by the statute (Rev. Codes, sec. 8536) to equip properly, with doors or gates, a hoisting cage used by it in a vertical mining shaft, from which, by reason of the omission, Monson, who was employed as a pumpman, fell and was killed. The defenses upon which defendant relied were general denials and the affirmative defenses of contributory negligence and assumption of risk by Monson. The evidence adduced, while clearly establishing the omission of duty by the defendant and the death of Monson, was held insufficient to show that the former was the direct proximate cause of the latter. It appeared that the hoisting cage in

use by defendant was furnished with doors so adjusted that they could readily be taken from their hinges and set aside when not in use in raising or lowering men; that, when so used, the doors were manipulated by employees known as topmen and station tenders; that the superintendent, engineers and foremen, when engaged in inspection and similar duties, did not use the doors, but depended for safety upon the handbar, another device with which the cage was equipped; that Monson in going to the places to which his duties called him, though he was expected to do so, did not put on the doors even when plaintiff accompanied him, which she sometimes did with friends visiting the mine; that the topman was not present, and that Monson did not put on the doors on the evening of his death; that at his request the hoisting engineer lowered him to the 1,400-foot station about 11 o'clock in the evening, that being the hour for him to go on shift; that he had with him his lunch in a bucket; that the cage was then raised to the surface; that at a signal given by Monson, at or about 2 o'clock, the cage, still without doors, was returned to him to raise him to the 600-foot station, where he was to complete his work for the night; that by direction of Monson the cage was then set by the engineer at the latter station; that, having received no signal to take it away, the engineer sent men down another compartment to ascertain the cause of the delay; that at about sixty feet above the 1,400-foot station these men found the dead body of Monson lying with the head upon the shaft timbers on one side, the feet in the same position on the other, and the hips resting on or against a wall plate; that the face was bruised and cut, but that there were no broken bones nor evidence of other wounds; that there was no evidence that the wound on the face was mortal, and that the lunch bucket was found in the cage. So far, the evidence contained in the record now before us is substantially the same.

At the second trial other testimony was introduced for the purpose of showing how the death of Monson occurred, as follows:

The witness Holland testified: "I did not make any examination of his body on the surface, not more than handling it, put-

ting it back on the cage, and taking it to the surface, and taking it off there. In handling his body it appeared to be all broke up. The bones were broken; appeared that way by handling. * * * His face was pretty badly cut up, right through here [indicating] across the face and mouth. I am indicating a gash between his eyes and nose, and also the top of the head, the brain. I saw a gash around his mouth, too. I could not tell, as an ordinary citizen, whether the wounds I saw were fatal enough to cause his death." On the first trial he had said nothing about the head and shoulders being crushed. On cross-examination he admitted that the following testimony given by him at that time was correct: "His [Monson's] face was all battered up and cut up. It was bruised and swollen and a good many cuts in it. I did not notice any broken bones. * * * There was blood just where he was resting is all I noticed. I did not observe any blood any farther down than that. He was found halfway between the 1,300 and 1,400-foot levels. I could not tell whether the bruises he had were caused by having fallen a distance, or whether they were caused by a squeeze. I did not examine the cage."

Witness Richards: "The shoulders and head were badly crushed. In fact, the head wasn't any thicker than that [illustrating by placing his hands together, palms inward] when I got it."

Dr. McCarthy: "I listened to the testimony of the two last witnesses, the testimony of Michael Holland and the testimony of the witness Richards, the undertaker. In my opinion, as a physician and surgeon, these wounds are sufficient to produce death."

The testimony of defendant's witnesses is as follows:

Frank, the mine superintendent: "I could see the head very plainly, and it was somewhat swollen. There was, as I remember it, a bad gash across the forehead, and another one, I think, across the face and cheek, extending through the lip. Aside from that, though, from the swelling and these gashes, it looked perfectly normal. It is absolutely not the case that the head was crushed as flat as a man's two hands. * * * My exam-

ination was from the east compartment. It was not with the light of a candle. We had several torches, torches such as are ordinarily used by shaftmen in the mine. * * * I had a very close look at the body at the time I discovered its whereabouts. I don't know what you mean by personal examination. I didn't feel of the body, if that's what you mean, and I didn't lift it, or anything of that sort; but the head was as close to me as about two feet, less than two feet. As a matter of fact, I am not sure which eye there was a gash over. I know there was a diagonal gash across the forehead, and another one on the face. That one went through the mouth. I didn't remove his clothes or make any examination of the shoulders to see whether they had been crushed. I made no physical examination of the head to see if that had been crushed, but I could see the head lying there in its perfectly normal shape, except for these two bruises on the face and forehead; but any statement as to its being flattened to the thickness of a man's two hands was absolutely at variance with my observations."

Orem, the deputy state mine inspector: "I noticed the head, but nothing particularly; looked to be swollen to me. As to the head being crushed as flat as an ordinary man's two hands, it wasn't that way when I saw it." On cross-examination he stated: "I made no physical examination. The man was dead. I noticed a scarred and cut-up head and face, and made no further examination, and didn't view the body again. I did not examine under his clothes to see what condition his shoulders were in."

It appeared from the testimony of these witnesses that the lunch bucket was overturned, and that the food it had contained was scattered about the deck of the cage. Incidentally it also appeared that there were a few men at work on the 200-foot level of the mine, and that these and Monson were the only employees in the mine on that shift. The wounds upon Monson's body, as described by Holland and Richards, would indicate even to a layman that he had been killed either by violence of a fall, or that he had in some way been caught between the cage and the timbers, and crushed to death. The defendant's witnesses, while

admitting that the face and head were bruised, deny that the head was crushed, and render it questionable whether the bones in the body were broken. In view of the contradictory statements made by Holland, the credit to be accorded to his testimony was exclusively for the jury to determine. So, also, in considering the description given by Richards as to the condition of the head, we find it in direct conflict with that given by defendant's witnesses. A jury might conclude that Richards' statement in this behalf was not true, and hence that his whole story was false. The opinion of Dr. McCarthy was based upon all the wounds described by Holland and Richards, and is of no value if their statements be disregarded. He expressed no opinion as to the fatal character of the wounds upon the face and head; so that, if the evidence of Holland and Richards be eliminated, there is no evidence upon which the cause of the death can be found other than what was before us on the former appeals. This we held was not sufficient to warrant the conclusion that the negligence of defendant was the efficient cause of the death. Therefore, upon any view of the evidence, it was clearly a question for the jury whether the death of Monson was the result of a fall from the cage by reason of the absence of the [2] doors. If under this condition of the evidence the trial court was not satisfied with the verdict, it was its duty, in the exercise of its legal discretion, to grant the defendant a new trial, and with its action this court may not interfere. (*Haggin v. Saile*, 14 Mont. 79, 35 Pac. 514; *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; *Welch v. Nichols, supra.*) In view of the contentions made by counsel, we have not deemed it incumbent upon us to determine the question whether the evidence as a whole would sustain a verdict for plaintiff. Counsel on both sides have proceeded upon the assumption that it would. We have not considered this question, and, since there must be another trial, refrain from expressing any opinion upon it.

The foregoing discussion disposes of this appeal. Counsel for defendant insist, however, that it was entitled to a new trial as a matter of right, because the court refused to submit to the jury any instruction upon the defense of assumption of risk. This

[4] defense is available to the master, even though, as in this case, the negligence alleged is in violation of a duty imposed by statute (*Osterholm v. Boston & Mont. C. C. & S. Min Co.*, 40 Mont. 508, 107 Pac. 499), and the question whether or not the injured servant did in fact assume the risk is ordinarily for the jury to determine. This is always the case when the evidence [3] is in such a condition that reasonable, fair-minded men might draw different conclusions from it. (*Anderson v. Northern Pac. Ry. Co.*, 34 Mont. 181, 85 Pac. 884; *Osterholm v. Boston & Mont. C. C. & S. Min. Co., supra.*) When it furnishes ground for but one inference, however, it presents a question of law for determination by the court.

The duty imposed by the statute is a continuing one. The master engaged in mining as was defendant here is bound to have his cages equipped with doors whenever men are being moved in them, whether up or down. If the employee about to be carried has his choice to continue in the employment or to abandon it when the master habitually omits use of the statutory safeguards, or if upon a particular occasion, on a like omission, he may submit to being carried or not, as he chooses, then it becomes a question whether he knows and appreciates the danger [4] to which he exposes himself. But, if at the time he is so situated that he has no choice, it may be presumed that he submits from necessity, and therefore does not assume the attendant risk. It might be a question whether Monson assumed the risk in using the cage when he went to his work, because he knew that the topman was not present, and that it was a part of his duty to put the doors in place. When the peril incident to the use of it at that time was ended, he had reached the place of duty, whence he could not escape except by such means as the master furnished him. So far as appears from the record before us, communication with the surface, except to control the movement of the cage by signal, was cut off. He had no choice. He must either stay there indefinitely, or use the cage as it was when sent to him. Under these circumstances, we think the question whether he assumed the risk of the danger brought about by the

defendant's omission of its continuing duty was not involved, and that the instruction upon this subject was properly refused.

In the *Osterholm Case* there was a difference of opinion as to whether it was safer to use the doors while the work of cutting stations was being prosecuted. The manager of the mine was of the opinion, not only that it was safer to use the cage without the doors while prosecuting this work, but also that this was a part of the work of sinking, and hence that the statute imposed no duty to use the doors. In view of this fact, and the additional fact that the plaintiff might well have entertained the same opinion, and hence acted of his own choice, it was held that the question whether he assumed the risk should have been submitted to the jury. The circumstances shown by the evidence in this case do not fall within the principle of that case.

The order is affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

MEEHAN, ADMINISTRATRIX, APPELLANT, v. GREAT NORTHERN RAILWAY CO., RESPONDENT.

(No. 2,935.)

(Submitted March 8, 1911. Decided March 22, 1911.)

[114 Pac. 781.]

Personal Injuries—Railroad Crossings—Contributory Negligence—Burden of Proof—Judicial Notice.

Personal Injuries—Contributory Negligence—Pleading.

1. In an action for personal injuries, contributory negligence is a matter of defense, and its absence need not be pleaded by plaintiff.

Same—Burden of Proof.

2. Though under Revised Codes, section 7962, paragraph 4, the law presumes that a person exercises ordinary care for his own safety, yet where plaintiff's own case presents evidence which, if unexplained, establishes *prima facie* contributory negligence, there must be evidence exculpating him, or he cannot recover.

Same—Railroad Crossings—Care Required of Travelers.

3. A pedestrian before crossing a railroad track, which is in itself a warning of danger, must look and listen, and, if necessary, stop to learn if there is danger.

Same—Injuries to Pedestrian on Track—Contributory Negligence.

4. In an action for the death of a pedestrian struck by a train, evidence held to show contributory negligence by decedent, precluding recovery.

Same—Evidence—Judicial Notice.

5. The court will take judicial notice of the fact that a city arc-light will cast its rays further than 300 feet.

Appeal from District Court, Silver Bow County; John B. McClellan, Judge.

Action by Katherine Meehan, as administratrix of the estate of John Meehan, deceased, against the Great Northern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Messrs. Breen & Hovevoll, for Appellant, submitted a brief. Mr. H. K. Jones argued the cause orally.

Contributory negligence cannot be imputed to the deceased. It is a matter requiring affirmative showing, and the affirmative showing must come from the defendant. (*Sprague v. Northern Pac. Ry. Co.*, 40 Mont. 487, 107 Pac. 412; *C. & O. Ry. v. Steele*, 84 Fed. 93, 29 C. C. A. 81; *C. R. I. & P. Ry. v. Hinds*, 56 Kan. 758, 44 Pac. 993; *Washington etc. Ry. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 115.) Therefore, as there is no showing in the agreed statement that Meehan was guilty of contributory negligence, and as there were no eye-witnesses to the accident, it will be presumed that the deceased acted with due care, i. e., that he stopped, looked and listened before attempting to cross the highway over the track of this respondent railway. (*Chesapeake Ry. Co. v. Steele*, 94 Fed. 93, 29 C. C. A. 81; *C. R. I. & P. Ry. v. Hinds*, 56 Kan. 758, 44 Pac. 993; *Dalton v. C. R. I. & P. Ry.*, 104 Iowa, 26, 73 N. W. 349; *Atchison etc. Ry. Co. v. Hill*, 57 Kan. 139, 45 Pac. 581; *Kimball v. Friend's Admx.*, 95 Va. 125, 27 S. E. 901; *Washington etc. R. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114; *Southern Ry. v. Bryant's Admrs.*, 95 Va. 212, 28 S. E. 183; *Huntress v. B. & M. R. Co.*,

66 N. H. 185, 49 Am. St. Rep. 600, 34 Atl. 154; *Cameron v. G. N. Ry.*, 8 N. D. 124, 77 N. W. 1016; *Cunningham v. Pennsylvania Ry. Co.*, 217 Pa. 97, 66 Atl. 236; *B. & P. R. Co. v. Landigan*, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262; *McBride v. N. P. Ry. Co.*, 19 Or. 64, 23 Pac. 814; *Texas etc. R. Co. v. Gentry*, 163 U. S. 352, 16 Sup. Ct. 1104, 41 L. Ed. 186; *Petty v. Hannibal Ry.*, 88 Mo. 306; *Schum v. Pennsylvania R. Co.*, 107 Pa. 8, 52 Am. Rep. 468; *Weiss v. Pennsylvania R. Co.*, 79 Pa. 387.)

Because of the foregoing, taken in connection with all of the circumstances of this case, *i. e.*, the various negligent acts of the railway company, but one conclusion can be drawn, *viz.*, that if the railway had had its tracks lighted, or had a light on the rear of the train, or had a lookout thereon equipped with the proper appliances to give signals to the engineer, or had rung the bell of the engine and caused the whistle to be blown before reaching this highway where deceased was killed, this deceased would have been warned of the approach of the train, or could have seen it approaching, as under the circumstances of the case it must be presumed that he did not see or hear it because the presumption is that he exercised due care before crossing: that he stopped, looked and listened. The agreed statement shows a *prima facie* right to recover, and as the court is substituted for the jury in passing upon the facts, it seems that the conclusion above indicated should be drawn from the facts, *i. e.*, that the negligent acts of the respondent proximately resulted in the death of Meehan, as this conclusion is the only one drawn by juries under cases involving similar facts.

For respondent, there was a brief by *Messrs. Veazey & Veazey*, and oral argument by *Mr. I. P. Veazey, Jr.*

Under the law, the duty of one about to cross a railroad track to look and listen is not satisfied by looking and listening before the act of crossing is commenced, but is a continuing duty. It is his duty not only to look and listen before stepping upon the tracks, but to continue to do so throughout the act of crossing, until the act of crossing is complete and the traveler

has placed himself outside of the zone of danger and is once more in a place of safety. (*Cranbuck v. D. L. & W. Ry. Co.*, 74 N. J. L. 473, 65 Atl. 1031; *Rogstad v. St. Paul M. & M. Ry. Co.*, 31 Minn. 208, 17 N. W. 287; *Kansas City etc. R. Co. v. Cook*, 66 Fed. 115, 13 C. C. A. 364, 28 L. R. A. 181; *Southern Ry. Co. v. Jones*, 106 Va. 412, 56 S. E. 155.) In cases similar to the one at bar it is a well-settled principle, controlling here, that where the physical facts show that, had deceased looked or listened, he could have seen or heard, then the presumption of due care is overthrown, and the presumption arises, within the corollary already referred to, that either he did not look or listen, or that, looking and listening, he did not heed what he saw or heard. (33 Cyc. 1073.) "If the traveler could have seen the train by looking, the presumption is that he did not look, or if he did look, he did not heed what he saw." (3 Elliott on Railroads, sec. 1165; see, also, *Myers v. B. & O. Ry. Co.* 150 Pa. 386, 24 Atl. 747; *Payne v. Chicago & A. Ry. Co.*, 136 Mo. 562, 38 S. W. 308; *Rollins v. C. M. & St. P. Ry. Co.*, 139 Fed. 639, 71 C. C. A. 615; *Pennsylvania Ry. Co. v. Mooney*, 126 Pa. 244, 17 Atl. 590; *Pennsylvania Ry. Co. v. Pfuelb*, 60 N. J. L. 278, 37 Atl. 1100; *Hauser v. Central Ry. of New Jersey*, 147 Pa. 440, 23 Atl. 766; *Central of Ga. Ry. v. Foshee*, 125 Ala. 199, 27 South. 1006; *Haetsch v. C. & N. W. R. Co.*, 87 Wis. 304, 58 N. W. 392; *Conkling v. Erie R. R. Co.* (N. J.), 43 Atl. 666; *Baker v. Pennsylvania R. R. Co.*, 182 Pa. 336, 37 Atl. 933; *Smith v. Detroit R. R. Co.*, 136 Mich. 282, 99 N. W. 15; *Braudy v. Detroit R. R. Co.*, 107 Mich. 100, 64 N. W. 1056; *Kallmerten v. Cowen*, 111 Fed. 297, 49 C. C. A. 346; *Southern Ry. Co. v. Davis*, 34 Ind. App. 377, 72 N. E. 1053; *L. & N. Ry. Co. v. Stephens*, 13 Ind. App. 145, 40 N. E. 148; *Cleveland etc. Ry. Co. v. Miller*, 149 Ind. 490, 49 N. E. 445; *Smith v. Wabash R. C.*, 141 Ind. 92, 40 N. E. 270; *Chicago etc. R. v. Donaldson*, 157 Fed. 821, 85 C. C. A. 185.) As further bearing on the presumption that if deceased could have seen, he either did not look or, looking, failed to heed what he saw, we also refer the court to the following cases: *Schmidt v. Railway Co.*, 191 Mo. 215, 90 S. W. 139, 3

L. R. A., n. s., 196; *Shum's Admr. v. Railway Co.*, 81 Vt. 186, 19 L. R. A., n. s., 973, 69 Atl. 946; *Schlimgen v. Railway Co.*, 90 Wis. 186, 62 N. W. 1045; *Bressler v. Railway Co.*, 74 Kan. 256, 86 Pac. 472; *Teel v. Railway Co.*, 49 W. Va. 85, 38 S. E. 518; *Sullivan v. Railway Co.*, 175 Pa. 361, 34 Atl. 798; *Caldwell v. Railway Co.* (Tex. Civ.), 117 S. W. 488; *Smith v. Railway Co.*, 34 Tex. Civ. 209, 78 S. W. 556. The following cases may also be cited in connection with presumptions arising in this case: *Gulf etc. Ry. Co. v. Mathews*, 32 Tex. Civ. 137, 73 S. W. 413, 74 S. W. 803; *Upton v. Railway Co.*, 128 N. C. 173, 38 S. E. 736; *Clegg v. Railway Co.*, 133 N. C. 303, 45 S. E. 657; *Stewart v. Railway Co.*, 136 N. C. 385, 48 S. E. 794; *Parish v. Railway Co.*, 102 Ga. 285, 29 S. E. 715, 40 L. R. A. 364.

MR. JUSTICE SMITH delivered the opinion of the court.

This cause was submitted to the district court of Silver Bow county, sitting without a jury, upon an agreed statement of facts. The court found in favor of the defendant Great Northern Railway Company (the other defendants having been dismissed from the action), and judgment was entered accordingly. From that judgment, an appeal has been taken.

From the statement it appears that two tracks of the defendant company, known as the "Stockyards" and "Y" tracks, extend through the city of Butte; that Warren avenue, so-called, extends from a northerly direction up to the right of way of the railway company in the vicinity of these tracks; that there is another street called Warren avenue, extending up to the right of way of the defendant company on the opposite side of the tracks, but which, if extended, would not connect with the first-named Warren avenue; that neither of said streets has been extended as a public highway across the tracks of the defendant, and the intervening space has never been dedicated to public use as a highway. It appears, however, that "for a period of at least fifteen years that portion of said ground over which said 'Stockyards' track and 'Y' track are constructed,

which lies between the lower 'Y' switch and the 'Stockyard' switch in said track have been continually used, without any invitation from, but with the knowledge of, said railway company and its officials, by the people of that vicinity as pedestrians, for the purpose of crossing on foot from that portion of said city lying easterly and northeasterly from said tracks, to that portion lying on the southerly and southwesterly side thereof, and especially by large numbers of miners in going to and from their homes and to and from the mines northeasterly thereof, and to and from the Western Iron Works and other industries in which they are engaged; that while said crossings have been made by such persons indiscriminately at various points between said switches, the great number of said crossings has been made along a beaten footpath, and over a strip of ground which would have been within the limits of Warren avenue if it had been extended southerly or southwesterly; that said tracks during all the times herein mentioned were, and still now are, built upon a railway grade or roadbed, the slope of which toward said Western Iron Works was and is about two feet vertically at the place where the deceased was killed, and varies in other places from two to four feet as regards that portion thereof facing the Western Iron Works, and the length of said slope is about five feet from the ties to the level of the surrounding country, and the slope of the roadbed facing away from the Western Iron Works is about four feet deep vertically, with a length of slope of about ten feet; that John Meehan, deceased, left the saloon of John Skubitz at some time after midnight of October 6, 1908, intending to go to his cabin, which was then located in the vicinity of the buildings of the Largey Lumber Company (on the opposite side of all the Great Northern Railway tracks), and upon leaving said saloon stated to Skubitz: 'I am going up Warren avenue where I will only have two tracks to cross, and will avoid the rough travel and the danger of all the switching while crossing the yards'; that no one saw the deceased after he left the saloon, until about 3 o'clock on the following morning, when he was found lying across the 'Y' track aforesaid, with one leg across said track;

the leg had been run over and cut off, and the other leg broken by some car or cars of the Great Northern Railway Company, in consequence of which he was then in a dying condition, and subsequently died within a few hours; that the train of cars mentioned constituted the only cars or car or engine, or other vehicle, owned or operated by the Great Northern Railway Company or its employees, that was on any part of said 'Y' track on the night of October 6 or the morning of October 7; that a passenger train of the defendant company backed over the 'Y' switch on the night in question until the rear car thereof had reached a point beyond the point where the deceased was found; that neither on the night of October 6 nor the morning of October 7 was any portion of said 'Stockyards' or 'Y' track lighted by any means of illumination furnished by the railway company, but that during the whole of said night an arc-light of the same size and capacity as is used elsewhere in the city of Butte for street lighting purposes was located at a point about 300 feet distant from the place where the deceased was found; and said light was actually burning and giving the amount of light given by ordinary street electric arc-lamps; that in backing said train the trainmen did not blow the whistle at all, nor ring the bell at all; that there was an acetylene gas-light on the outside of and in the cupola of the rear platform of the rear car of the train, which was an observation car, said light being intended to light the rear platform thereof and being equal to about a thirty-two candle-power electric-light, and the entire rear portion of said rear car consisted mainly of large windows and a door with full glass panels, but that no other lamps were on the outside of the rear end of said car as it backed down, nor was any brakeman or other employee of the defendant company stationed upon said rear car; that neither the railway company nor any of its employees discovered the presence of deceased on the track or learned of his death until four hours after he was found; that at the time the rear car of the train was going over the lower 'Y' switch, backing as aforesaid, it was running at a rate of four miles an hour, and thereafter the speed of said train was proportionately reduced from four miles an hour to

a dead stop; that no obstructions of any kind existed at the time aforesaid within a circle with a radius of 200 feet, with a center at the point where said deceased was found, and no obstructions and no buildings or other structures of any kind existed on the ground lying between the track extending from said lower 'Y' switch to the 'Stockyards' switch, in a southerly direction to the south line of Second street, except as indicated; that at the time in question the Great Northern Railway Company had in force the two following rules: '(1) The engine bell must be rung when an engine is about to move, also when running through tunnels and the streets of towns or cities, and for a quarter of a mile before reaching every public road crossing at a grade and until it is passed; (2) When a train is being pushed by an engine, except when shifting and making up trains in yards, a trainman must be stationed in a conspicuous position on the front of the leading car with the proper signals, so as to perceive the first sign of danger, and immediately signal the engineman'; that the night of October 6 and the early morning of October 7 were clear and windy, and the weather was fair; there was no precipitation; that persons who were in the vicinity of the place where Meehan was killed, differ as to whether it was cloudy and dark, or clear and bright." It was further agreed that the judge of the district court might inspect the premises where Meehan was killed, and the observation car which ran over him. We presume the learned judge made the inspection.

It is contended on the part of the appellant (1) that the place in question was a "prescriptive highway"; (2) that, if not a prescriptive highway, the evidence shows a highway by common-law dedication; (3) that, if it was not a highway, the railway company owed to the deceased the same duty of exercising ordinary care for his safety as would have been the case had it been a highway, on account of the fact that he was a licensee upon its tracks. We do not, however, find it necessary to decide the questions involved in these contentions, because we are of opinion that, assuming that the defendant was guilty of a want

of ordinary care, the district court was justified in concluding that the plaintiff had failed to overcome the *prima facie* showing of contributory negligence on the part of deceased disclosed by the facts and circumstances embodied in the agreed statement.

In actions for personal injuries the absence of contributory negligence is not required to be pleaded or proved by the [1] plaintiff, but its presence is a matter of defense. (*Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450; *Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905; *Mulville v. The Pacific Mut. Life Ins. Co.*, 19 Mont. 95, 47 Pac. 650; *Hunter v. Montana Central Ry. Co.*, 22 Mont. 525, 57 Pac. 140; *Snook v. City of Anaconda*, 26 Mont. 128, 66 Pac. 756; *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871; *Nelson v. Boston & Mont. C. C. & S. Min. Co.*, 35 Mont. 223, 88 Pac. 785; *Birsch v. Citizens' El. Co.*, 36 Mont. 574, [2] 93 Pac. 940.) The law presumes that a person exercises ordinary care for his own safety. (Rev. Codes, sec. 7962, par. 4; *Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243.) However, as was said by this court in *Harrington v. Butte etc. Ry. Co.*, 37 Mont. 169, 95 Pac. 8, 16 L. R. A., n. s., 395: "When the plaintiff's own case presents evidence which, if unexplained, would make out *prima facie* contributory negligence on his part, there must be further evidence exculpating him, or he cannot recover."

Whether we regard the agreed statement of facts as constituting the plaintiff's case alone, or that of both parties, which is perhaps more nearly the fact, the result is the same. On its face it discloses a case of unexplained contributory negligence on the part of the deceased. Let us remember that the railroad tracks were in themselves a warning of danger. Meehan was on foot, and there was nothing to divert his attention. Not only that, but he had in mind the necessity of crossing the tracks when he left the saloon, and in order to get upon them he was obliged to climb an embankment of some height. Even though [3] it be conceded that the defendant company negligently omitted to light its tracks, and that its employees neglected to give the required signals, it was nevertheless the duty of Meehan

to make a vigilant use of his senses; to look or listen, and to stop for that purpose, if necessary, to learn if there was danger. (*Hunter v. Montana Central Ry. Co., supra.*) He was bound [4] to look and listen before attempting to cross the tracks, and not to walk carelessly into a place of danger. What situation do the surrounding facts and circumstances disclose? The train was backed down to the place of the accident at a very slow rate of speed, so slow, indeed, that a man might easily walk ahead of it in safety; there was a city arc-light at a point not to exceed 300 feet away, and we take notice that such a light [5] will cast its rays much farther than 300 feet; the train consisted of several cars, besides the locomotive, and must have made some noise, even at the slow rate of speed at which it was proceeding; railroad cars are large objects, easily discernible by electric-light; added to this there was an acetylene gas-light in the cupola on the outside of the observation car, which was intended to, and, as we know from every-day experience, does light the rear platform of the car; there were no obstructions of any kind to interfere with the power of observation of the deceased, and no buildings or other structures which would tend to form a dark background to the cars as they approached. We are impelled to the conclusion that Meehan neither looked, listened, nor took any precautions for his own safety. Had he used his senses, he could not have failed both to hear and to see the approaching train. Having omitted to use them, he was guilty of contributory negligence, and the district court properly so held.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

OTT, APPELLANT, v. PACE ET AL., RESPONDENTS.

(No. 2,944.)

(Submitted March 9, 1911. Decided March 22, 1911.)

[115 Pac. 37.]

Contracts—Real Property—Rescission—Fraud—Complaint—Ambiguity—Waiver—Laches—Duress.**Contracts—Rescission—Fraud—Complaint—Insufficiency.**

1. The complaint in an action to rescind a contract on the ground of fraud, from which the date when plaintiff discovered the facts upon which he relied for rescission could not be ascertained was vulnerable to a special demurrer because ambiguous, unintelligible and uncertain.

Same—Effect of Fraud.

2. Fraud in the inducement of a contract does not render it absolutely void, but only voidable at the option of the person defrauded.

Same—Fraud—Affirmance—Delay.

3. Where plaintiff after having been in possession of ranch property for about one year, under a contract of sale, entered into a substitute agreement which in terms annulled the former one and under which he gained additional advantages in the matter of making deferred payments, remained in possession for another period of eighteen months, made payment of a delinquent installment on the purchase price, harvested and sold crops, knowing at the time he made the second contract that he had been induced to enter into the original one through fraud on the part of defendants, he will be held to have elected to affirm the alleged fraudulent transaction, thus precluding his right to rescind.

Same—Substitution of New Contract—Waiver of Fraud.

4. By agreeing to the substitution of a new contract for one deemed by him to have been fraudulent, plaintiff waived the fraud which entered into the execution of the former one.

Same—Duress—What Does not Constitute.

5. Threats to enforce payment of promissory notes in the manner provided in a contract of sale in case of nonpayment, do not constitute duress.

Same—Fraudulent Representations—What are not.

6. Alleged false representations, to the effect that the proceeds from the sale of crops would meet deferred payments on a ranch, that those on the premises at the time of the sale were of a certain quality and value, and that the soil was rich and productive, were mere expressions of opinion, which, in the absence of special circumstances pleaded, tending to give them a different character, were not sufficient to constitute actionable fraud.

Same—Rescission—Laches.

7. Plaintiff's right to rescind on the ground of fraud held to have been barred by laches.

Appeal from District Court, Jefferson County; Llew. L. Callaway, Judge.

ACTION by Sebastian Ott against Ike E. O. Pace and others. From a judgment sustaining a general and special demurrer to the amended complaint, plaintiff appeals. Affirmed.

In behalf of Appellant, *Mr. Lewis A. Smith* submitted a brief and argued the cause orally.

The ground of demurrer that the complaint is ambiguous, uncertain and unintelligible cannot be considered, unless all three of the defects appeared in the complaint; that is, that it is uncertain and ambiguous and unintelligible, and if one of these grounds is lacking, the demurrer must be overruled. (*Kraner v. Hasley*, 82 Cal. 209, 22 Pac. 1137; *Wilhoit v. Cunningham*, 87 Cal. 453, 25 Pac. 675; *White v. Allatt*, 87 Cal. 245, 25 Pac. 420; *Greenebaum v. Taylor*, 102 Cal. 624, 36 Pac. 957.)

Does the amended complaint state a cause of action? We submit that it does. As stated in *Butte Hardware Co. v. Knox*, 28 Mont. 121, 72 Pac. 301, a case of actionable fraud and deceit is made out if it appears with reasonable certainty: (1) That certain representations which the purchaser had a right to rely upon were made by or at the instance of the vendor; (2) that they were false; (3) that the purchaser believed such representations to be true and did rely upon them, and was induced thereby to enter into the contract; and (4) that the purchaser suffered damages thereby. The amended complaint meets all of those requirements.

Nowhere does it appear even by inference that the plaintiff abandoned his right to rescind for the fraud; he alleges that as soon as he discovered the fraud and deceit of the defendants, he demanded relief at their hands, and that he made repeated demands upon them for this purpose, and was put off with false promises, and finally (becoming convinced that they had no intention of doing anything) he turned the property back to them and brought this action. "A demurrer insisting upon a lapse of time short of the statutory period will not be sustained, unless the complaint upon its face makes a clear case of unreasonable delay, upon the part of the complainant after the discovery of the fraud charged." (*Jones v. Slauson*, 33 Fed.

632; *Sheldon v. Packer Co.*, 8 Fed. 769, 10 Biss. 470; *Taylor v. National Bank*, 6 S. D. 511, 62 N. W. 99.)

Waiver is a question of fact (*Wilder v. Beede*, 119 Cal. 646, 51 Pac. 1083), and is largely one of intent. (*Pryor v. Foster*, 130 N. Y. 171, 29 N. E. 123.) The entering into the second contract does not show a waiver of the fraud. Plaintiff alleges facts explaining fully why this second contract was entered into. It cannot be inferred from the complaint that the plaintiff had at this time discovered all the facts concerning the fraud. He could not ascertain what the average yearly crop the land was capable of producing was, until he had given it a fair trial; this could not be done in one year or even in two years. In *Charbonnel v. Seabury*, 23 R. I. 543, 51 Atl. 208, where a dentist had purchased a half interest in a dental business represented to him to be worth \$20,000 per year, when it was actually worth less than \$5,000, the purchaser had worked in the business and under the contract for six months, and the court says: "The objection that plaintiff worked under the contract for a period of six months is also unsound, he was bound to work long enough to find out whether the statements were true."

Mr. I. E. O. Pace, appearing *pro se*, and *Mr. M. H. Parker*, submitted a brief in behalf of Respondents, and argued the cause orally.

The plaintiff nowhere in his complaint makes a direct and positive allegation that the defendants, or either of them, falsely and fraudulently made any representation. "Where a contract is attacked on the ground that it was procured through false representations or fraud, the opposing party is entitled to know from direct and consistent allegations of the pleading that he is called upon to defend against such charges." (*Butte Hardware Co. v. Knox*, 28 Mont. 111, 72 Pac. 301; *T. C. Power & Brother v. Turner*, 37 Mont. 521, 97 Pac. 950; *Colorado Springs Co. v. Wight*, 44 Colo. 179, 96 Pac. 820, 16 Ann. Cas. 644; *Kemmerer v. Pollard*, 15 Idaho, 34, 96 Pac. 206; *Oppenheimer v. Clunie*, 142 Cal. 313, 75 Pac. 899.)

Statements, no matter how strongly made, which show on their face that they are merely opinions, are not fraudulent representations. (1 Page on Contracts, sec. 96; *Butte Hardware Co. v. Knox, supra*; *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779; *Crocker v. Manley*, 164 Ill. 282, 56 Am. St. Rep. 196, 45 N. E. 577, 18 Morr. Min. Rep. 485.) A statement as to what will happen in the future is clearly a matter of opinion, not of fact. Thus a statement as to the profits that would be made, or dividends that would be declared in a given business, or one that a mine was rich in silver, that the ore on the dump would pay the value of the stock, and that large dividends would be paid, etc., are mere predictions, and hence matters of opinion only. (1 Page on Contracts, sec. 98; *West Seattle etc. v. Herren*, 16 Wash. 665, 48 Pac. 341; *Akin v. Kellogg*, 119 N. Y. 441, 23 N. E. 1046.)

If after discovering the truth of the representations a party conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief of all the misrepresentations. (*Evans et al. v. Duke*, 140 Cal. 22, 73 Pac. 732; *Oppenheimer v. Clunie*, 142 Cal. 313, 75 Pac. 899; *Greenwood v. Fenn*, 136 Ill. 146, 26 N. E. 487.) Substituting a new contract for the old one is a waiver of the fraud in the execution of the old contract. (*Kimball Co. v. Raw*, 7 Kan. App. 17, 51 Pac. 789; *Lee v. McClelland*, 120 Cal. 147, 52 Pac. 300.)

It is not duress to make threats which a person has a right to make. (*Kimball Co. v. Raw*, 7 Kan. App. 17, 51 Pac. 789; *McClair v. Wilson*, 18 Colo. 82, 31 Pac. 502.)

The mere fact, if such is a fact, that the plaintiff entered into an unwise or a foolish contract does not establish the existence of fraud. (1 Page on Contracts, sec. 87.)

The plaintiff complains that the defendants promised to procure someone to take the contract off his hands but failed to do so. A promise to do something in the future and a mere nonperformance is not fraud. (1 Page on Contracts, sec. 99; *Lawrence v. Gayety*, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382, 17 Morr. Min. Rep. 169.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This suit was brought to secure the cancellation of two certain contracts and the return of certain moneys paid under them. To the amended complaint a general and special demurrer was sustained, and plaintiff, electing to stand upon his pleading, suffered judgment to be entered against him, and has appealed to this court.

From the amended complaint we gather these facts: In August, 1907, defendants Pace and Woods owned and were in possession of some 634 acres of land near Whitehall, Montana, together with certain water rights and water ditches, also a leasehold interest in 160 acres of state land, and owned and possessed certain personal property consisting of crops then on the land, farm machinery, and livestock; that on August 20, 1907, plaintiff and Pace and Woods entered into a contract for the sale of the real estate and personal property by Pace and Woods to Ott, for the sum of \$19,500, payable \$5,000 in cash, \$4,500 in six months, \$5,000 in eighteen months, and \$5,000 in two years, the deferred payments to be secured by the deposit of certain certificates representing shares of the capital stock of the Ritzville (Washington), flouring-mill; that the notes representing the deferred payments, the securities, and a warranty deed were to be deposited with the Whitehall State Bank as trustee for the parties; that the first payment was made, and plaintiff took possession of the property and harvested and used the crops of 1907; that, when the first installment note fell due, Ott was unable to meet the payment; that he was permitted to withdraw from the trustee certificates representing fifty-five shares of the mill stock, and these he sold for \$6,033.20, and paid the delinquent installment; that on July 1, 1908, a new contract was entered into between Ott and the Pace-Woods Improvement Company, a corporation; that this new contract recites the existence of the former one; that the corporation had succeeded to all the rights and interests of Pace and Woods, and provides that the contract of August 20, 1907, "is hereby set aside and an-

nulled and all parties released therefrom"; that the new contract provides for the release of the remaining shares of the mill stock to Ott, and fixes the payment of the balance due on the property in smaller installments and extending over a longer period of time; and that on December 23, 1909, Ott gave up possession of the property. The institution of this suit followed immediately.

It is alleged in the complaint that the first contract was procured by false representations on the part of Pace and Woods, in that they represented to plaintiff that the soil of the land in question was rich and productive; that the crops then on the place (August, 1907) consisted of 500 tons of hay of the value of \$5,000, 600 sacks of potatoes of the value of \$600, 4,000 bushels of oats of the value of \$2,000, and eight acres of peas of great value for feeding stock; and that the average yearly crops theretofore raised on the premises equaled in amount and value the crops then on the premises. It is alleged that these representations were false; that the soil was rich and productive only in spots; that much of it was gumbo, in which nothing but greasewood and noxious weeds would grow; that the crops on the premises in August, 1907, consisted of only 150 tons of hay, which was practically valueless on account of the presence of large quantities of noxious weeds and grasses which rendered it unfit for stock or other purposes, only 1,385 bushels of oats and 100 sacks of potatoes, and that all of the crops did not exceed in value \$800; that the statement of the amount and value of the crops theretofore raised on the premises was false, and that the average yield of said premises theretofore had not exceeded in value \$800, and that the entire property did not exceed in value \$5,000; that the plaintiff skillfully and zealously cultivated the premises, but that they could not be made to yield more than \$800 per year, which sum was inadequate to defray the expense of cultivation and care; and that plaintiff placed on the premises improvements of the value of \$1,257 and paid taxes and assessments to the amount of \$247.05; that plaintiff was not familiar with the country or with the character of the soil or with the facts as to the yield of the premises; that he believed the representations made by Pace and Woods, relied on them,

and parted with his money on the faith of such representations. It is then alleged:

"Sixth. That, upon the discovery of the falsity of the said false and fraudulent representations, plaintiff demanded of the defendants that they make him whole and restore him to his position of August 20, 1907, and prior to the signing of said contract of August 20, 1907, and the payments made by him, as hereinbefore set forth, and offered to deliver said premises and everything of value received by him from said defendants, all of which said defendants failed and refused to do."

In paragraph 8 plaintiff alleges that on December 23, 1909, he again demanded of Pace and Woods and the defendant corporation that the money which he had theretofore paid be returned to him, and that the contracts be canceled, and notified the defendants that he rescinded such contracts, and thereupon surrendered up the premises, improved in value to an extent greater than the value of the crops taken by him.

Possibly, the allegations of paragraph 6 above can be referred in point of time to one of two dates: (1) To the time when plaintiff harvested and marketed the crop of 1907, which was some time prior to February 20, 1908; or (2) to December 23, 1909, the date mentioned in paragraph 8 above. But, if they cannot be construed as referring to either of the dates mentioned, then it cannot be gathered from the complaint when plaintiff discovered that he had been defrauded, or when he made the demand for restoration.

In paragraph 4 of the complaint appears this language: "And the compelling this plaintiff, under duress and fear as herein alleged, and by threats of instituting bankruptcy proceedings against him, and by false promises made by said defendants, Pace and Woods, to secure someone to purchase said premises, which promises were made by said defendants without any hope or expectation or intention of fulfilling them or attempting so to do, but simply as an additional means of getting this plaintiff to enter into said contract with said corporation, and as additional means of further entangling this plaintiff and making it more difficult for him to secure relief." These words baffle our at-

tempts to give them meaning. They do not appear to have any connection with the allegations preceding or following them. They do not constitute a sentence. There is not any subject, and they appear to be meaningless.

If, then, the allegations of paragraph 6 above cannot be construed as referring in point of time to either date we have [1] mentioned, the special demurrer should have been sustained, for the complaint is open to the charge of being ambiguous, unintelligible and uncertain. As against a general demurrer, it may be that the allegations of paragraph 6 above are sufficient (*Taylor v. National Bank*, 6 S. D. 511, 62 N.W. 99); but, when attacked by a special demurrer, they fail to meet the requirements of the law. Since plaintiff is seeking a rescission of these contracts, and the statute (Rev. Codes, sec. 5065) requires him to act promptly upon discovering the facts which entitle him to rescind, defendants had a right to know when such discovery was made; for, though plaintiff may have had just ground for rescission, his right might be lost by laches.

But, assuming that the allegations of paragraph 6 can be referred in point of time to one of the dates we have mentioned, we may then treat the language quoted from paragraph 4 as surplusage. First, then, assume that the plaintiff's allegations in paragraph 6 are construed to refer to the time when he harvested and sold the crop of 1907, which transpired on or before February 20, 1908, and we find from the complaint that thereafter he secured permission to withdraw fifty-five shares of the hypothecated mill stock; that he sold it and applied the proceeds to the payment of the installment due under the first contract; that on July 1, 1908, he entered into the new contract which in terms annuls the first one, and by the terms of which he gained advantages in having the hypothecated securities returned to him, and in securing more advantageous terms for the payment of the remaining installments. During all this time plaintiff remained in possession of the premises and used them and appropriated the 1907 crops to his own use. Since fraud in the [2] inducement of a contract does not make it void, but only voidable (*Turk v. Rudman*, 42 Mont. 1, 111 Pac. 739), it was

within the power of Ott to rescind or to treat the first contract as valid (1 Page on Contracts, sec. 139; 9 Cyc. 432, 436); and his continuing in possession of the property and his payment [3] of the delinquent installment after discovering the fraud amounted to an affirmation of the first contract and constituted a bar to a rescission. (*Ruhl v. Mott*, 120 Cal. 668, 53 Pac. 304; *Oppenheimer v. Clunie*, 142 Cal. 313, 75 Pac. 899; *Greenwood v. Fenn*, 136 Ill. 146, 26 N. E. 487; *Crooks v. Nippolt*, 44 Minn. 239, 46 N. W. 349; 2 Pomeroy's Equity Jurisprudence, sec. 897; 9 Cyc. 436.) In *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798, the rule is stated as follows: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had theretofore [4] subsisted." So, also, the substitution of the new contract for the old one amounted to a waiver of the fraud which entered into the execution of the old one. (*Kimball Co. v. Raw*, 7 Kan. App. 17, 51 Pac. 789; *Lee v. McClelland*, 120 Cal. 147, 52 Pac. 300.)

But it is alleged that the new contract was procured by duress, and apparently it is sought to charge that the payment of \$6,033.20 was also made under duress. In the brief of appellant his counsel says that upon the complaint, "it appears clearly that he entered into this second contract to prevent the forfeiture of his mill stock, which under the contract of purchase would be delivered by the bank to the defendants Pace and Woods (or the defendant Pace-Woods Improvement Company as the successor in interest of Pace and Woods) as their absolute property on the default of the plaintiff to meet any note when due." The first contract provides for its termination upon breach by Ott. It makes time of the essence of it, and provides that, if the installments are not paid promptly when due, the mill stock shall be delivered to Pace and Woods as their absolute

property. According to the complaint, then, Pace and Woods [5] threatened to do only things which under the contract they had a right to do, and threats of that character do not constitute duress. (Rev. Codes, sec. 4975; *Kimball Co. v. Raw*, above; *McClair v. Wilson*, 18 Colo. 82, 31 Pac. 502; 7 Current Law, 1201.)

Second, let us assume, however, that the allegations of paragraph 6 above should be construed as referring in point of time to December 23, 1909 (though this assumption seems absolutely unwarranted), and we have this situation: Plaintiff harvested and marketed the crop of 1907, and, before the first installment under the original contract fell due, was in full possession of the facts that the representations made by Pace and Woods with respect to the crop of 1907 were untrue. In *Ruhl v. Mott*, above, the supreme court of California said: "It is true that where one is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case no duty in law is devolved upon him to employ such means of knowledge. But, when thereafter he discovers that he has been put upon and defrauded as to one material matter, notice is at once brought home to him that a man that has been false in one thing may have been false to him in all, and it becomes incumbent upon him to make full investigation. A defrauded party has but one election to rescind, and he must exercise that election with reasonable promptness after discovering the fraud. * * * Delay in rescission is evidence of a waiver of the fraud, and of an election to treat the contract as valid. Any acts evincive of an intent to abide by the contract are evidence of an affirmation of the contract, and of a waiver of the right of rescission."

But plaintiff further proceeded in possession of the premises, planted the crops for 1908, made payment of the installment which had been delinquent since February 20 of that year, entered into the new contract of July 1, harvested and marketed the crop of 1908, planted and harvested the crop of 1909, and not until another payment was about to become due did he contend that he had been defrauded into making either contract.

Thus far we have treated the allegations of the complaint as charging actionable fraud in the particulars mentioned; but most of the charges are altogether insufficient. In *Butte Hardware Co. v. Knox*, 28 Mont. 111, 72 Pac. 301, this court said: "Mere expressions of opinion or of judgment do not, except in [6] particular cases, which must be shown by the pleading, constitute actionable fraud or false representations. Statements made by the owner of property as to the superior kind, quality or character of his possessions, do not of themselves constitute actionable fraud or false representations, though such statements may not accord with the truth." The only false representations which it is alleged Pace and Woods made are: (1) That the proceeds from the sale of the crops would meet the deferred payments as they accrued; (2) that the crops on the premises in August, 1907, were of certain quantity and value; (3) that the soil was rich and productive; and (4) that the yearly average yield from the premises theretofore had been 500 tons of hay of the value of \$5,000, 600 sacks of potatoes of the value of \$600, 4,000 bushels of oats of the value of \$2,000, and eight acres of peas of great value for feeding stock. It is perfectly apparent at once that the first and second statements, if made, were nothing but expressions of opinion (1 Page on Contracts, sec. 98), and the same is generally true of representations of the character of the third one (*Butte Hardware Co. v. Knox*, above; *Tryce v. Dittus*, 199 Ill. 189, 65 N. E. 220; 1 Page on Contracts, sec. 96).

It fairly appears from the complaint that plaintiff was in Whitehall at or prior to the time the first contract was executed, and the transaction itself brought to his notice such facts as to put him on inquiry as to the quality of the soil. In fact, so far as the allegations of the complaint are concerned, plaintiff had the same opportunity to examine and determine the character of the soil before the contract was made as he had afterward. In the absence of any special circumstances pleaded tending to give a different character to the representations 1, 2, and 3 from that which appears on their face, we may dismiss them as not sufficient to show actionable fraud; and we have left but the

statements attributed to Pace and Woods, as to the extent and value of the crops theretofore grown on the premises. Assuming, as we may do, that the plaintiff was entitled to a reasonable opportunity to determine the truth or falsity of those statements (*Charbonnel v. Seabury*, 23 R. I. 543, 51 Atl. 208), he fails to state what, if any, efforts he made, when he discovered that the representations were false, or whether these representations alone induced him to enter into the contracts. He continued in possession of the property for three seasons, harvested three crops, and appropriated them to his own use, and, in the absence of allegations showing some excuse for the delay in claiming that he had been defrauded, we think his right, if any he had, [7] should be held to be barred by laches; that he has failed to meet the requirements of the statute above which prescribes the conditions upon which he might have rescinded the contracts. (*Ruhl v. Mott*, above.)

Our conclusion is that the complaint is open to the objections raised by the general and special demurrer, and that the trial court's ruling was correct.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

BRITANNIA MINING CO., RESPONDENT, v. UNITED STATES FIDELITY & GUARANTY CO., APPELLANT.

(No. 2,950.)

(Submitted March 10, 1911. Decided March 22, 1911.)

[115 Pac. 46.]

Sheriffs—Execution Sales—When Wrongful—Liability of Surety—Mining Machinery—When Realty—Levy—When Unnecessary—Negative Pregnant.

Sheriffs—Sale of Realty as Personal Property—Mining Machinery—Liability of Surety.

1. In selling mining machinery under an execution as personal property, upon five days' notice only, instead of as real property on notice

of twenty days, defendant sheriff violated the provision of section 6828, Revised Codes, and subjected himself and his surety to the penalty prescribed by section 6829.

Sheriffs—Execution—When Levy Unnecessary.

2. Mining machinery, being deemed affixed to the mine, is real property; a judgment becomes a lien upon it from the time it is docketed; hence, after docketing of such judgment, a formal levy of execution was unnecessary to bring the property within custody of the law.

Pleadings—Denial—Negative Pregnant.

3. The allegation in an answer denying that defendant has any knowledge or information sufficient to form a belief that plaintiff company "is now or at any of the times in said complaint mentioned was duly, or at all, organized or existing under or by virtue of the laws of the state of Wisconsin," etc., was a negative pregnant, and did not raise any issue as to the corporate existence of plaintiff.

New Trial—Grounds—Insufficiency of Evidence.

4. Where, by the undisputed evidence, plaintiff was entitled to some amount, a general verdict for defendant was not supported by the evidence, and the granting of a new trial was proper.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by the Britannia Mining Company against the United States Fidelity and Guaranty Company. A verdict was rendered for defendant, and from an order granting a new trial, defendant appeals. Affirmed.

Messrs. Kremer, Sanders & Kremer, for Appellant, submitted a brief. *Mr. J. Bruce Kremer* argued the cause orally.

The levy in the action of *Nickey v. Britannia Min. Co.* was made while Quinn's first official bond was in force and effect, and the sale complained of was made while the second official bond was in force and effect, and during the second term of his office as sheriff. It also appears that the bond sued on is the bond in force during the second term and not the one in force when the levy was made. We contend that the bond sued on is not the bond upon which liability, if any, attaches, but if any liability attaches at all, it is upon the bond in force during the time when the levy was made. (Stearns' Law of Suretyship, sec. 174; *Baker v. Baldwin*, 48 Conn. 131; *Larned v. Allen*, 13 Mass. 295; *Wooddell v. Bruffy's Heirs*, 25 W. Va. 465; *Elkin v. People*, 4 Ill. (3 Scam.) 207; *Governor v. Eastwood*, 12 N. C. 157; *People v. McHenry*, 19 Went. 482; *Tyree v. Wilson*, 9 Gratt. 59, 58

Am. Dec. 213; *People v. Kendall*, 14 Colo. App. 175, 59 Pac. 409; *State v. Hamilton et al.*, 16 N. J. L. 153; *Marney v. State*, 13 Mo. 8; *Colyer v. Higgins*, 1 Duval (Ky.), 6, 85 Am. Dec. 601; *State v. John Roberts et al.*, 12 N. J. L. 114, 21 Am. Dec. 62; *State v. Turner*, 8 Gill & J. (Md.) 125; *Campbell v. Cobb*, 34 Tenn. 18.) The gravamen of the alleged wrongful acts of Quinn as contended for by plaintiff is the alleged wrongful sale, whereas, as a matter of fact, if there was any dereliction in official duty, it was in making the levy and in giving what is claimed to have been a notice of sale for only five days instead of twenty. The wrong, if any, therefore, having been done under the first bond, any official liability began to exist at that time. (Freeman on Executions, sec. 106.) If there were any failure on the part of the sheriff to comply with the terms and obligations of the bond, it had its inception from the time Quinn levied upon real property as personal property. (*Whitney v. Preston*, 29 Neb. 243, 45 N. W. 619; see, also, *Frink v. Roe*, 70 Cal. 305, 11 Pac. 820.)

The general rule is that corporate existence may be proved by production of the charter followed by proofs, acts done under it and in conformity with it. (*Town of Mendota v. Thompson*, 20 Ill. 197; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 656.) But evidence of the passage of an Act incorporating a company, and that certain persons are doing business under the corporate name, is insufficient to prove that the corporation has been organized under the Act. (*State v. Murphy*, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.) Under the rule laid down in the case of *Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995, we submit that there was no adequate or sufficient proof of corporate existence, and hence the verdict was proper.

Can the defendant surety company be held liable for the acts of Charlton, who, plaintiff contends, became the purchaser at the alleged sale and committed the acts of breaking the machinery and removing the same, which resulted in plaintiff's damage, if any? The following authorities answer this query in the negative: *Fullam v. Stearns*, 30 Vt. 443; *Stewart v. Nunemaker*,

2 Ind. 47; *King v. Cook*, 4 Ill. App. 525; *Snell v. State*, 32 Tenn. 344; *Ferrin v. Symonds*, 11 N. H. 363.

Mr. W. A. Pennington, appearing in behalf of Respondent, submitted a brief and argued the cause orally.

Appellant cites a number of early decisions in support of its contention that the cause of action is upon the bond for the first term. Among these is the case of *People v. McHenry*, 19 Wend. (N. Y.) 482. That decision was made under a statute containing a direct and positive command to a retiring sheriff to execute all writs in his possession at the close of his term, as the decision on page 486 clearly states. The same is true of the case of *People v. Kendall*, 14 Colo. App. 175, 59 Pac. 409. It is difficult to see the value of such authorities under our statutes, which compel the retiring sheriff to turn over all his writs, papers and unearned fees to his successor. In the case of *Colyer v. Higgins*, 1 Duval (Ky.), 6, 85 Am. Dec. 601, cited by appellant, the court followed the early common law of England, where there was no such thing as sale of real estate, and where as stated in Freeman on Executions, section 106, the officer who entered upon the execution of the writ, "had a special property in the goods seized." It is safe to say that not one of the decisions cited by appellant was made under statutes similar to ours, requiring the retiring sheriff to surrender up all papers, and unearned fees, and providing a summary manner for enforcing these requirements, or under a statute such as ours fixing the penalty and damages upon the officer who *sold* without the notice provided by law.

A denial of corporate existence such as the denial in defendant's answer has been held insufficient to raise any issue as to corporate capacity. (*Wright v. Fire Ins. Co.*, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; *McCormick Harvesting Machine Co. v. Hovey*, 36 Or. 259, 59 Pac. 189.) In both these cases the denial only went to the organization and existence of the plaintiff under the laws of the state or country named, and was an admission of organization and existence under the laws of some other state, territory, country or Act of Congress.

The sheriff received and acted under a writ which recited that the judgment was rendered against the "Britannia Mining Company, a corporation," and it commanded him to satisfy the judgment out of the property of "the Britannia Mining Company, a corporation." The return of the sheriff attached to the execution shows that he did sell the property of the defendant therein, plaintiff herein, which property is described in the return. This is at least *prima facie* evidence of plaintiff's corporate existence against his surety. This rule seems to be universal, and in case of principal and surety the only limitation upon it is that the act, admission or official report, or return must have been in connection with the business out of which the default or liability arose, and to cover which the bond was given. Neither the sheriff nor his surety, the defendant herein, can deny that the sheriff sold the property of plaintiff, then the defendant, Britannia Mining Company, and that said company is a corporation. (*Phillips v. Eggert*, 133 Wis. 318, 126 Am. St. Rep. 963, 113 N. W. 686; *Brandt on Suretyship*, 3d ed., secs. 796, 799; *Guaranty Co. v. Phenix Ins. Co.*, 124 Fed. 170, 59 C. C. A. 376; *Stephens v. Crawford*, 1 Ga. 574, 44 Am. Dec. 680; *Bank v. Smith*, 12 Allen (Mass.), 243, 90 Am. Dec. 144; *Hall v. United States F. & G. Co.*, 77 Minn. 24, 79 N. W. 590.) Section 3015, Revised Codes, makes sheriff's return *prima facie* evidence of facts stated therein. Section 3810 will not permit one who assumes obligations to a corporation to deny its corporate existence.

Mr. JUSTICE HOLLOWAY delivered the opinion of the court.

For two years prior to January 2, 1905, John J. Quinn was the duly elected, qualified and acting sheriff of Silver Bow county. The sureties upon his official bond during that time are not mentioned and are not parties to this proceeding. At the general election held in November, 1904, Quinn was re-elected and on the second day of January, 1905, qualified and entered upon the discharge of his duties for his second term, with

this defendant, United States Fidelity and Guaranty Company, surety upon his official bond for that term. On December 20. 1904, there had been placed in Quinn's hands, as sheriff, an execution issued on a judgment recovered by Charles E. Nickey against this plaintiff. At that time plaintiff owned and was possessed of certain mining claims, mining fixtures, machinery, and tools used in working such mining claims. On January 3, 1905, and after the beginning of his second term, Quinn, as sheriff, sold the fixtures and mining machinery under the execution mentioned above, to satisfy the Nickey judgment. At such sale one Charlton became the purchaser, and thereafter took possession of the purchased property and removed it. On February 27, 1905, after a hearing the district court made an order vacating the sale, and directing the surrender of the property to the Britannia Mining Company, this plaintiff. This action was thereupon brought against the United States Fidelity and Guaranty Company, as surety on Quinn's official bond for his second term. It is alleged that Quinn sold the property on January 3, 1905, without having given any previous notice of such sale, except a posted notice of five days only; that Charlton broke the fastenings and removed the machinery, and in so doing certain parts were broken and otherwise injured; that by reason of the removal of the machinery the works in the mining claims were flooded and great damage done; that the plaintiff company was at great expense in returning the machinery to its place and in renewing broken and missing parts. It is alleged that the sale by the sheriff under the circumstances constituted a breach of official duty. The prayer is for judgment for \$11,000 damages, and costs.

The answer admits the corporate existence of the defendant company; the election, qualification and service of Quinn as sheriff; the giving of the official bond by the defendant as surety for Quinn during his second term; that the damages claimed by plaintiff have not been paid; denied generally every other allegation in the complaint; and pleads affirmatively (1) that the levy under the Nickey execution was made during Quinn's first term; and (2) the pendency of another action. A demurrer

was sustained to each of these affirmative defenses, and, defendant electing to stand upon its answer, the cause proceeded to trial, which resulted in a general verdict in favor of the defendant. Plaintiff thereupon moved for a new trial upon all the statutory grounds, except excessive verdict. A bill of exceptions in support of the motion was prepared and settled, and on September 12, 1910, the court by a general order granted the motion, and defendant appealed.

1. It is insisted by appellant that, if the sheriff's action in selling the property, as it was sold, gave rise to any liability, it was a liability incurred during his first term, for which appellant is not responsible; and this contention is made upon the theory that the entire proceedings of the sheriff under the execution, from the date of its levy until and including the sale, constituted an entirety, an indivisible act, and since such act had its inception during Quinn's first term, the liability, if any, attached as of the date of the levy.

The property sold by Quinn was of such character that it was deemed affixed to the mining claims (Rev. Codes, sec. 4428), and was real property. (Sec. 4425.) Section 6828 provides that, before real property can be sold on execution, notice of sale must be given for twenty days by posting and publication. Section 6829 provides: "An officer selling without the notice prescribed by the last section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages. * * * " It will [1] be determined at once that in selling this machinery as personal property, upon five days' notice only, Quinn violated the provision of section 6828 above, and subjected himself and his bondsmen to the penalty of section 6829.

To the contention of counsel for appellant that the wrong was done when the levy was made, it would seem sufficient answer to say that the penalty prescribed by the statute is affixed to a wrongful sale, not a wrongful levy. It appears that the Nickey judgment was rendered in Silver Bow county, where the property sold by Quinn was situated. Section 6807 provides that from the time a judgment is docketed it becomes a lien upon the real property of the judgment debtor in that county, not exempt,

and continues for six years, unless the judgment is satisfied. While it does not appear from the complaint in this action when the Nickey judgment was rendered or docketed, evidence was admitted, without objection, which tends to show that the judgment was obtained some time in 1904 prior to the date the execution was issued. In the absence of anything to the contrary, it will be presumed that the clerk of the district court performed his official duty as prescribed by section 6807 above. It may be said, then, that it fairly appears from this record that at the time the execution was issued, and thereafter up to the time the sale of January 3, 1905, was made, the judgment was a lien upon the property sold. While counsel for appellant insist that Quinn's wrongful act was in making the levy, they have adroitly refrained from defining the term "levy" as applied to an execution issued upon a judgment, which is itself a lien upon the real property sought to be sold. The term "levy" has a well-defined meaning; but it cannot apply to an execution issued upon a judgment of this character. The object of a levy is to bring the property within the custody of the law and prevent the judgment debtor from disposing of it to the prejudice of the creditor before sale can be made. But in this instance the Nickey judgment was itself a lien upon the property to be sold. The property was already in the custody of the law and beyond the control of the judgment debtor, so far as the rights of the creditor were concerned. The execution was the mere instrumentality through which the creditor might reap the fruit of a seizure which had already been made by virtue of the judgment lien. In such a case the Code contemplates that the sheriff shall give the required notice and sell. Nothing more is required, and the references to a levy, in section 6827 and elsewhere, can apply only to property of a character different from that we are [2] now considering. To make a formal levy in a case of this kind would be an idle ceremony, without significance, legal or otherwise. These views follow the reason of the law, and are supported by the authorities from states having similar statutory provisions. (*Wood v. Colvin*, 5 Hill, 228; *Bagley v. Ward*, 37

Cal. 121, 99 Am. Dec. 256; *Tullis v. Brawley*, 3 Minn. 277 (Gil. 191); *Folsom v. Carli*, 5 Minn. 333 (5 Gil. 264), 80 Am. Dec. 429; *Knox v. Randall*, 24 Minn. 479.) The principle here involved was recognized by this court in *Holter Hardware Co. v. Ontario Mining Co.*, 24 Mont. 184, 61 Pac. 3, in holding that real property subject to a lien by attachment may be sold under execution without any further levy.

Our conclusion is that the sale made by Quinn constituted a wrongful act, which is the subject of plaintiff's complaint.

2. It is urged that in this action plaintiff failed to prove its corporate existence; but there was not any issue made upon that [3] question. The complaint alleges that the plaintiff is a corporation organized under the laws of Wisconsin, with its principal office in the city of Milwaukee. The denial in the answer is: "That as to whether or not the plaintiff, Britannia Mining Company, is now or at any of the times in said complaint mentioned was duly, or at all, organized or existing under or by virtue of the laws of the state of Wisconsin, or having its office or principal place of business in the city of Milwaukee in said state or elsewhere, this answering defendant denies that it has any knowledge or information thereof sufficient to form a belief." This is a negative pregnant, which does not raise any issue as to the corporate existence of the plaintiff, but rather admits that the plaintiff is a corporation organized under the laws of some state. (*Bourke v. Butte etc. Power Co.*, 33 Mont. 267, 83 Pac. 470.)

3. Apparently counsel desire this court to intimate in advance the extent of Quinn's liability for the wrongful sale. But we cannot anticipate that another trial will be had upon the pleadings as they are presented in this record, and any announcement of ours at this time would be *obiter*.

Since upon the undisputed evidence plaintiff was entitled to [4] a verdict for some amount, the general verdict in favor of defendant was not supported by the evidence, and the order granting a new trial was clearly correct, and is affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

BORDEAUX, APPELLANT, *v.* BORDEAUX, RESPONDENT.

(No. 2,921.)

(Submitted March 9, 1911. Decided March 22, 1911.)

[115 Pac. 25.]

Divorce—Previous Separation—Reconciliation—Refusal—Desertion—Findings—Duty of Court—Evidence—Good Faith—Intent—Pleadings—Amendments.

Pleadings—Amendments—Bill of Exceptions—Record—Review.

1. An amended pleading supersedes the original one, is therefore no part of the judgment-roll, and can be made a part of the record on appeal only by bill of exceptions, properly settled; hence the action of the court in sustaining a motion to strike certain portions of the answer as originally drawn was not subject to review where the displaced pleading was not so identified.

Equity—Findings—Office of Jury Advisory.

2. In an equity action tried by the court sitting with a jury, the office of the jury is advisory only; the judge may adopt or reject their findings or make others conforming to his own views of the evidence.

Same—Divorce—Findings—Duty of Court.

3. In a suit for divorce, though tried with a jury, it was the duty of the judge under section 6763, Revised Codes, to make written findings upon all material issues of fact made by the pleadings, whether requested or not. This duty became imperative where timely request was made, and refusal constituted reversible error.

Same—Evidence—Erroneous Admission—Presumptions.

4. In an equity action, though tried with a jury, it may be presumed that the judge in reaching the final conclusion disregarded incompetent and immaterial evidence, admitted over objection.

Evidence—Exclusion—Harmless Error.

5. Error in the exclusion of evidence was harmless, where the same matter had theretofore been admitted or subsequently found its way into the record.

Divorce—Separation—Reconciliation—Intent—Evidence.

6. In a suit for divorce asked for on the ground of desertion, where plaintiff's wife, who had been living apart from him by mutual consent, refused to accept his invitation to again live with him, testimony as to his intentions with reference to the manner of living he proposed to furnish to defendant in case she returned, was competent to show his good faith in his effort to bring about a reconciliation.

Same—Separation—Consent—How Determined.

7. Consent to a separation need not be expressed in words; it may be implied from facts and circumstances occurring at the time it was initiated, as well as from subsequent acts and admissions of the parties.

Same—Separation—Reconciliation—Refusal—Desertion.

8. Where a separation has once been established by mutual agreement, express or implied, it will be presumed to continue until one of the parties revokes consent and in good faith seeks reconciliation and restoration; whereupon the party rejecting the overtures thus made is guilty of desertion.

Same—Separation—Consent—Exclusion of Evidence—Error.

9. In an action for divorce in which the issue was whether the parties had been living apart under a mutual agreement of separation, the exclusion of letters written by defendant wife shortly after the separation which showed that it was by consent, was prejudicial error.

Same—Written Evidence—Erroneous Exclusion—Review on Appeal.

10. The supreme court will consider written evidence erroneously excluded by the trial judge but incorporated in the record, as properly before it in finally disposing of an appeal in an equity case under the provisions of section 6253, Revised Codes.

Same—Reconciliation—Good Faith—Question of Fact.

11. Whether a letter written by plaintiff to defendant in a divorce action seeking a reconciliation was written in good faith or induced by threats, contained in one indited by the latter to the former, to institute certain legal proceedings against him, was a question of fact.

Same—Separation—Reconciliation—Desertion—Evidence.

12. Evidence in an action for divorce sought on the ground of desertion, where the parties had lived apart for some years, held, to show that the separation had been by mutual consent, that an offer of reconciliation made by plaintiff husband was made in good faith, that defendant capriciously rejected it, and that therefore she was guilty of desertion, under section 3650, Revised Codes, and plaintiff entitled to the relief asked.

Appeal from District Court, Silver Bow County; J. Miller Smith, a Judge of the First Judicial District, in and for Lewis and Clark County, presiding.

ACTION by John R. Bordeaux against Ella F. Bordeaux. From a judgment for defendant and an order overruling a motion for a new trial, plaintiff appeals. Order denying new trial affirmed and decree of divorce reversed, and cause remanded, with directions to enter decree in favor of plaintiff.

Mr. L. P. Forestell and **Mr. I. A. Cohen** submitted a brief and a reply brief in behalf of Appellant. **Mr. Forestell** argued the cause orally.

Appellant assigns as error the refusal of the trial court to find upon the issues of desertion; whether plaintiff and defendant were living separate and apart by mutual acquiescence and consent; whether the plaintiff revoked his consent to said separation, and in good faith sought a reconciliation, and offered to restore defendant to all of her marital rights, and whether the defendant willfully refused said offer and deserted plaintiff,

and still continued so to do. These issues were raised by the complaint and denied in the answer. They were material and evidence was introduced thereon. A request for findings upon these issues was regularly made in writing. A party litigant is entitled to a specific finding upon each material issue. (*Quinlan v. Calvert*, 31 Mont. 115, 77 Pac. 428.) The court's decree is unsupported by any finding and cannot stand. (*City of Helena v. Hale*, 38 Mont. 481, 100 Pac. 611.) Failure of the trial court to find upon a material issue is ground for a new trial. (1 Spelling on New Trial and Appellate Procedure, sec. 253, and cases cited; *Power v. Fairbanks*, 146 Cal. 611, 80 Pac. 1075; *Brown v. Macey*, 13 Idaho, 451, 90 Pac. 339; *Shively v. Eureka, T. G. M. Co.*, 129 Cal. 293, 61 Pac. 939; *Bordeaux v. Bordeaux*, 30 Mont. 36, 75 Pac. 524; *Buckner v. Davis* (Tex. Civ. App.), 129 S. W. 639; *Patch v. Miller*, 125 Cal. 240, 57 Pac. 986; *Kusel v. Kusel*, 147 Cal. 52, 81 Pac. 297, 298.)

Defendant admitted that she had an opportunity to test the good faith of the plaintiff's offer of reconciliation, but did not do so because she thought it was in bad faith. "Acquiescence is consent by silence." (*Thomson v. Thomson*, 121 Cal. 11, 53 Pac. 403.) The husband may select the home. (Rev. Codes, sec. 3652; *McMullin v. McMullin*, 123 Cal. 653, 56 Pac. 554, 140 Cal. 112, 73 Pac. 808.) The question of the good faith of the offer of a home is one of fact. (*Wagner v. Wagner*, 104 Cal. 295, 37 Pac. 935; *Olcott v. Olcott* (N. J. Ch.), 26 Atl. 469; *Musgrave v. Musgrave*, 185 Pa. 260, 39 Atl. 961; *Porter v. Porter*, 162 Ill. 398, 44 N. E. 740.) Defendant should have tested plaintiff's professions by acceptance. (*Newing v. Newing*, 45 N. J. Eq. 498, 18 Atl. 166.)

The husband is not liable for the wife's support when abandoned by the wife. (Rev. Codes, sec. 3725; *Kessler v. Kessler*, 2 Cal. App. 512, 83 Pac. 257; *Isaacs v. Isaacs*, 71 Neb. 537, 99 N. W. 268.) A wife is not entitled to separate maintenance where after separation the husband offers to receive her again in his house and to afford her suitable maintenance. (2 Am. & Eng. Ency. of Law, 2d ed., 97, 98, and cases cited.)

Mr. John J. McHatton submitted a brief in behalf of Respondent, and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an action for divorce on the ground of desertion. The trial was by the court sitting with a jury. The jury being unable to agree upon answers to special interrogatories submitted to them, the court discharged them and rendered judgment, dismissing the action, after refusing plaintiff's request for specific findings upon the controverted issues. The plaintiff has appealed from the judgment and an order denying his motion for a new trial.

The parties were married on June 2, 1886, but have lived separate and apart since January 23, 1898. The complaint was filed on March 10, 1909. It contains two counts. In the first it is alleged that the defendant deserted the plaintiff on March 19, 1906; in the second the desertion is alleged to have occurred on March 15, 1907. At the trial the first count was abandoned. As shown by the allegations of the amended complaint and the evidence introduced, plaintiff's theory of the case is that from January 23, 1898, until March 15, 1907, he and the defendant had lived apart by mutual consent, and that on the latter date he in good faith sought a reconciliation with defendant and a restoration of the marital relation, but that she rejected his overtures and has ever since continued to reject them, thus rendering her guilty of desertion.

In her second amended answer the defendant denies that she ever deserted the plaintiff, and alleges that he willfully and without cause deserted and abandoned her, and for more than a year prior to March 16, 1907, refused to live with her. She asks for a decree granting her a limited divorce and requiring the plaintiff to pay her attorney's fee, and to provide for her separate maintenance. In their effort to reach an issue in the district court, the parties amended their pleadings in several particulars, which they deemed material.

When the transcript of the record was filed in this court, counsel for defendant asked leave to file a supplement to it, which he insisted properly exhibited, by bill of exceptions, the action of the court in sustaining a motion of plaintiff to strike from her amended answer allegations deemed by him to be material. Leave was granted, subject to the right of counsel for plaintiff at the hearing to object to the consideration of the supplement as a part of the record. The purpose sought by filing the supplement was to have this court review the action of the trial court upon the motion to strike, under the authority conferred by the statute (Rev. Codes, sec. 7118), and affirm the decree, if satisfied that, on account of the error in sustaining the motion, it ought to be affirmed, notwithstanding any error committed against the plaintiff in other particulars. This supplemental transcript, in addition to copies of the pleadings upon which the trial was had, contains what purports to be copies of the original complaint, the original and first amended answers, and the motion to strike. It has neither a caption nor a conclusion; nor does it contain any recital identifying these papers or any of them. There was filed with the clerk, however, a document of which the following is a copy: "Title of Court and Cause. Bill of Exceptions. Be it remembered that the court did, on the first day of April, 1910, sustain the plaintiff's motion to strike from defendant's second amended answer to which defendant excepted, and then and there prepared and had this her bill of exceptions thereto at the time, which is full, true, and correct. J. Miller Smith, Judge presiding." This document does not purport to bring anything into the record by reference or otherwise. Whether it refers to the motion, a copy of which precedes it, or the other papers, we can but guess. The order sustaining the motion is part of the judgment-roll. So far as it is concerned, it is in the judgment-roll and properly before us. (Rev. Codes, secs. 6784, 6806.) The amended answer at which the motion was directed, together with the motion by which alone the stricken matter could be identified, are not authenticated in any way. The pleading as reformed into the

[1] second amended answer took the place of the pleading as originally drawn, which, because it was thus superseded and displaced, was no longer a part of the judgment-roll or of the record on appeal. (*Raymond v. Thexton*, 7 Mont. 299, 17 Pac. 258; *Butte Butchering Co. v. Clarke*, 19 Mont. 306, 48 Pac. 303.) It could not therefore be considered a part of the record, unless made such by a bill of exceptions properly settled by the judge. This, as we have seen, has not been done. The conclusion must therefore follow that the only paper before us showing what the action of the court was is the order found in the judgment-roll. Whether it prejudiced the defendant we cannot say, because we have no means of knowing the theory upon which it proceeded or what its effect was. The section of the statute referred to, upon which counsel for defendant would rely, whether applicable to an order made anterior to the trial or not—and we do not decide whether it is—cannot avail him, because the record is not in proper form to give his exceptions material import. The supplemental transcript must therefore be disregarded.

Counsel for plaintiff contends that the decree should be reversed and a new trial ordered because of the refusal of the court to make specific findings. At the time the case was submitted, he not only prepared and submitted written findings, but also had his request for findings entered in the minutes. The refusal by the court to grant the request was clearly erroneous. This is an equity action. The office of the jury was [2] merely advisory. Though they had agreed upon answers to the interrogatories submitted, the result would nevertheless have been a trial by the judge, and the final decision would have been his decision without regard to the action of the jury, for he still had the option to reject these findings and to make others conforming to his own views of the evidence. (*Lawlor v. Kemper*, 20 Mont. 13, 49 Pac. 398; *Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106; *Wetzstein v. Largey*, 27 Mont. 212, 70 Pac. 717.)

Whether request was made for findings or not, it was the duty [3] of the judge to make them. The statute declares: "Upon

a trial of a question of fact by the court, its decision or findings must be given in writing and filed with the clerk within twenty days after the case is submitted for decision." (Rev. Codes, sec. 6763.) This command is clear and specific, requiring no interpretation. It is true that another section (6766) declares that "no judgment shall be reversed on appeal for want of findings at the instance of any party who, at the close of the evidence and argument in the cause shall not have requested findings in writing and had such request entered in the minutes of the court. * * * " Even so, the duty to make findings becomes imperative when timely request is made, as was done by plaintiff's counsel. (*Estill v. Irvine*, 10 Mont. 509, 26 Pac. 1005; *Quinlan v. Calvert*, 31 Mont. 115, 77 Pac. 428.) A party failing to make such request cannot allege error because of the omission to obey the command of the statute. Every finding necessary to support the judgment will then be implied. (*Morse v. Swan*, 2 Mont. 306; *Ingalls v. Austin*, 8 Mont. 333, 20 Pac. 637; *Forrester v. Boston & Mont. C. C. & S. Min. Co.*, 21 Mont. 544, 55 Pac. 229; *Vreeland v. Edens*, 35 Mont. 413, 89 Pac. 735.) Nevertheless, its plain mandate should be obeyed in every case, by the making of specific findings upon all material issues of fact made by the pleadings, followed by the appropriate conclusion or conclusions of law, indicating the judgment to be entered thereon. (Sec. 6764.) The court having failed to pursue the statute, the plaintiff is entitled to have the decree reversed.

Counsel has assigned many errors upon rulings made in the admission and exclusion of evidence. The evidence admitted over objection was in some instances incompetent or immaterial. [4] The presumption may be indulged that in reaching the final conclusion the court disregarded it. We find no prejudicial error in this regard; nor, except in one instance, was any of the [5] excluded evidence of substantial value. In some instances the evidence offered had already been admitted or subsequently found its way into the record without objection. For illustration: Upon his direct examination the plaintiff was asked

what his intention was with reference to the manner of living he proposed to furnish to defendant if she had returned to live with him. He had theretofore testified, substantially, that he had invited her by letter to return to him, offering and intending at the same time to provide a home for her, and to furnish her such style of living as his means would justify. The court, upon defendant's objection, would not permit him to answer. [6] The evidence called for was material to show plaintiff's good faith in his effort to bring about a reconciliation, and it was clearly competent for him to state what his real purpose was. (*Finch v. Kent*, 24 Mont. 268, 61 Pac. 653; 1 Jones on Evidence, secs. 145, 167; Greenleaf on Evidence, sec. 328c; 1 Wigmore on Evidence, sec. 581.) The statement previously made by him, however, had already supplied the fact sought to be brought out. The error was without prejudice.

Plaintiff had testified that he and defendant had separated by mutual consent at the beginning of the year 1898; that the defendant had since that time been living in Salt Lake City, Utah, and other places, as it suited her convenience. His statement as to her consent was controverted by the defendant, who testified, in effect, that he had sent her from home in opposition to her wishes, and that the separation had begun without her acquiescence and continued so until he had brought an action against her for divorce in 1899. Counsel for plaintiff then offered in evidence several letters written by her to plaintiff from Salt Lake City during the four months immediately following the separation; the purpose being to impeach her testimony and also to corroborate the plaintiff's statement that the separation had been by mutual consent. These letters are all incorporated in the record. We shall not enter into an examination of them in detail. Suffice it to say, that they are all expressive of friendly regard, a full understanding on defendant's part of the cause of the separation, and that it was to be of indefinite duration. There is not in any of them an expression of the least dissatisfaction with anything done by plaintiff looking to a separation, nor of any desire on her part to resume

the old relations. They enter into the details of her daily life. They refer frequently to articles of household furniture which she would have him send her, and some of them contain minute directions as to what disposition should be made by him of the other furniture, books, toilet articles, and bric-a-brac which she had left in the home, when he concluded, as he afterward did, to break up housekeeping and rent the family residence.

"A consent need not be expressed in words. It may be implied from the failure of the parties to make overtures after a quarrel; from acquiescence in the separation; from a positive refusal to renew cohabitation after a separation; from a deed of separation; from a desire of plaintiff that her husband should occupy separate apartments; or from other circumstances which show the plaintiff's consent, or that the separation was not [7] against her will. The consent need not be express; it may be tacit, as where the plaintiff is willing and had made no objection. When a separation has taken place under circumstances from which the plaintiff's consent can be inferred, such separation is not wrongful, and will not become so until he has made some efforts to seek the return of the defendant." (1 Nelson on Divorce and Separation, sec. 67.) In the absence of express consent, it is the province of the court to take into consideration all the facts and circumstances occurring at the time the separation is initiated, together with the subsequent acts and admissions of the parties, and from them to determine whether there was such mutual consent as to relieve the one party from the charge of desertion by the other. (*McMullin v. McMullin*, 140 Cal. 112, 73 Pac. 808.) Once the relation has been established [8] by mutual agreement, express or implied, it will be presumed to continue until one or the other party revokes consent and in good faith seeks reconciliation and restoration. When this shall have been done by one party, and the other rejects the overtures thus made, the latter is guilty of desertion. (Rev. Codes, sec. 3650; *Howard v. Howard*, 134 Cal. 346, 66 Pac. 367.) The theory of the statute is that, where both parties have consented, neither can allege that the act of the other is wrongful,

'until consent has been revoked, though each may at the time of the separation have intended to abandon the other. (*Benkert v. Benkert*, 32 Cal. 468; *Herold v. Herold*, 47 N. J. Eq. 210, 20 Atl. 375, 9 L. R. A. 696.) In view of the conflict in the [9] statements of the parties, these letters, written almost immediately after the separation, furnished convincing evidence that they were living apart by mutual consent. The exclusion of them was prejudicial error.

Having reached the conclusion that the decree must be reversed because of the errors noted, it becomes our duty under the statute (Rev. Codes, sec. 6253) to determine the questions of law and fact presented by the record, upon the whole case, and to make such disposition of it as the circumstances require.

As we have pointed out, the court excluded evidence which we deem substantially material to a determination of the question how the separation of the parties was initiated. If this were in the record merely in the form of an offer to prove by the oral statements of witnesses, we should feel impelled to order a new trial or to remand the case, with direction to the district court to admit the evidence and consider it in making its findings; for it is the exclusive prerogative of that court to determine the credibility of witnesses, and this court may not invade its province. But here the evidence in question is in [10] writing. This being the condition, no question of its credibility arises and this court may as well interpret it and attach to it the import it ought to have as the trial court. We shall therefore regard it as properly before us, and consider the case upon the merits.

The plaintiff and defendant were the only witnesses. As already stated, their testimony was in direct conflict, though neither stated definitely what was said and done at the time the agreement was reached to separate. The letters themselves, however, point to one conclusion only, *viz.*, that they separated by mutual consent. What the impelling cause was it is not now important to inquire; but it appears that scandalous rumors touching the conduct of defendant in accepting attentions from

other men had come to the knowledge of plaintiff, that he was displeased on account of them, and that both thought that a separation would be expedient. These rumors, we assume, were the moving cause. Accordingly the defendant went to Salt Lake City, Utah, to live with her parents. For four months letters were exchanged frequently. The plaintiff sometimes remitted money. Suddenly, in April 1898, the exchange of letters ceased. There is nothing in the evidence to explain this fact; but in none of the fourteen letters written by defendant during that time was anything said by way of objection to the separation, and so far as she referred to the condition of affairs then existing, she was entirely satisfied with it. She never expressed, directly or indirectly, any desire to return, and, as has already been stated, advised the plaintiff as to the disposition of household effects when he came to rent the house. While denying that she did acquiesce in the arrangement for separation, the defendant explained that by the term "acquiesce" she meant that she and plaintiff did not enter into any express agreement that they would separate.

In January, 1899, the plaintiff began an action in Silver Bow county against defendant for divorce on the ground of desertion and also adultery. She filed her counterclaim for divorce, alleging cruelty and desertion. The district court found that she had been guilty of the adulteries alleged against her, and entered a decree for the plaintiff. Upon appeal this court reversed the decree on the ground that, assuming that the adulteries were fully established, the plaintiff had condoned them. It ordered the action to be dismissed, because it was of the opinion that neither party was entitled to relief. (*Bordeaux v. Bordeaux*, 30 Mont. 36, 75 Pac. 524, on rehearing, 32 Mont. 159, 80 Pac. 6.) This litigation ended in April, 1905. No exchange of communications, either by personal interview or by letter, occurred between the parties after this date, until March 19, 1906. On that date the plaintiff wrote to defendant as follows:

"Dear Ella:

"It has been some time since I have sent you any money to your support, and for all of the difficulties that there have been

between us, I have always intended to fulfill my duty which I may be under toward you. You will find inclosed in this letter a draft for one hundred dollars, which I hope you will accept and make use of. I wish further to say that as the past trouble has not resulted in gain to either one of us, should you at any time wish to return to Butte to live I will provide you with a suitable home.

Yours truly,

"JNO. R. BORDEAUX."

The defendant made no reply. On March 13, 1907, she wrote plaintiff as follows:

"Mr. John R. Bordeaux:

"I am here in Butte. I am now, as I have been for the past several years, without any means of support. You have contributed nothing for two years, except the small sum of \$100. I desire to remain in Butte. It will be necessary for me to have at least the sum of \$500 per month hereafter from you for my support. This will be a meager allowance and one which you can well afford to pay. I expect to be at large expense in obtaining and fitting up living quarters and consequently must require you to pay me at once the sum of \$2,500 for this purpose, together with the sum of \$500 for the first month's support. In case you refuse to comply I shall undertake to force compliance by legal proceedings. You have neglected the obligation of support long enough. Kindly notify John J. McHatton, my attorney, and pay the money to him.

"ELLA F. BORDEAUX."

To this plaintiff replied:

"Butte, Montana, March 15, 1907.

"Dear Ella:

"I am in receipt of your letter of date March 13, 1907, and in reply to same, I desire to call your attention to my letter of date March 15, 1906, in which I invited you to return to Butte, to live with me, and stating that I would provide you with a suitable home. I have heard nothing from you since that time

until to-day, when I received your letter. In view of which silence I have long ago made up my mind that you did not intend to return to Butte to live with me, and that you had evidently found quarters more to your liking. However, if you desire to return to live with me, I will provide you with such living quarters as my means will warrant. I am not willing, however, to accede to the unreasonable demand contained in your letter, but am always willing to perform my duty as a husband, as I understand it, and as required by the laws of this state. I shall do everything which the laws of this state require me to do, and I will discharge every obligation which the laws of this state require of me because of the relation I sustain to you. And in accordance therewith, I am prepared to provide you with a suitable home and to furnish you with maintenance and support. I am now residing at No. 320 West Broadway, in this city, which is a suitable home for us both, and I will welcome you there, if you choose to return and resume our marital relations, and will provide you with all necessary and proper support and maintenance. Otherwise, I shall consider myself under no further obligation to contribute to your support. Trusting that you will see fit to return home,

“I remain your affectionate husband,
“JOHN R. BORDEAUX.”

In reply to this letter defendant wrote a long communication in which she stated that in his letter of March, 1906, plaintiff had failed to ask her to return to Butte to live with him, and charged him with bad faith in writing the one of March 15, 1907, saying that he did it merely for the purpose of protecting himself against his obligation to discharge the duty he owed her under the law to furnish her with support. She also charged him with malignant cruelty toward her, and with desertion, because he had failed to furnish her any support subsequent to March 26, 1898. She stated that the place designated by him as the home to which he invited her was neither desirable nor suitable. She refused to accept his judgment as to what would be a discharge of his legal duties as her husband, saying that,

judging by his past conduct, she preferred to take the judgment of the court upon that subject. The letter concludes: "I shall, therefore, be forced to reserve all my rights, which I hereby notify you I do, and to insist upon the discharge of your obligation under the law—not as you believe it, or think it, or are willing to suggest it to be—but as it really is. The fault is now, and it always has been, with you. Since you are not willing to accord me my rights I must rely upon the law and its justice for that purpose."

It was admitted by plaintiff that he had contributed nothing toward the support of defendant after the institution of his action in 1899, except the sum of \$100 sent to her on March 19, 1906. It appears that he has during the time since the separation been receiving a gross income of about \$500 per month. There is no direct evidence on the subject; but that the defendant has never been in want is a just inference from the fact that she has been living in Salt Lake City, Utah, Seattle, Washington, Portland, Oregon, or at Butte, as it has suited her convenience, with funds sufficient to meet her personal expenses. The source of these funds is not definitely disclosed, but circumstances appearing in the evidence indicate that she has obtained them, either from her parents or from the income from property inherited by her from them since the date of the separation. It was not controverted that out of the income received by plaintiff he has been required to pay his taxes and bear the expense of insurance and necessary repairs upon the property from which it is derived, besides his current personal expenses, and that he was required to meet the expenses of the litigation attendant upon the action for divorce instituted in 1899, including counsel fees for both himself and the defendant. It appears that he contracted on this account a considerable indebtedness, and that for that purpose he put an encumbrance upon some of his property, which still remains. Nor is it controverted that the place designated in his letter of March 15, 1907, as his home, is in a very desirable part of the city of Butte and is such as he can reasonably afford. As a reason why he did not in his

letter designate the home where they were living at the time of the separation, he stated that it was then under a lease for a term of years and was not available. The only objection made by defendant to the home to which he invited her appears to be that, being a suite of rooms in a rooming house, she could not keep servants and live in the sumptuous style that she desired.

There is nothing in any of this evidence upon which a conclusion can be based that either of the parties did anything to change the agreement to separate, in 1898, prior to March 15, 1907. It does not appear that the plaintiff agreed in 1898 to support defendant. Though it be conceded that he did, when his remittances ceased she made no complaint; nor did she upon the cessation of them, or at any time afterward, revoke her consent to remain away or express any desire to return home. Nor did the bringing of the action for divorce, in 1899, work a change in the *status quo*. His effort to dissolve the marriage, met by a counter-effort on her part to do the same, only emphasized the willingness of both to remain apart permanently. The original separation by consent was, therefore, not converted into a desertion by either one by any act of revocation by the other, under the provisions of the statute (Rev. Codes, sec. 3650), until the letter of March 15, 1907, was written by the plaintiff.

It is insisted that this was not in good faith, but was induced [11] by her threat to institute legal proceedings against him. Whether it was written in good faith was a question of fact. (*Wagner v. Wagner*, 104 Cal. 293, 37 Pac. 935; *McMullin v. McMullin*, 123 Cal. 653, 56 Pac. 554; *Olcott v. Olcott* (N. J.), 26 Atl. 469; *Musgrave v. Musgrave*, 185 Pa. 260, 39 Atl. 961; *Porter v. Porter*, 162 Ill. 398, 44 N. E. 740.) It may be true that the threat of the defendant in her letter of March 13 was the immediate, moving cause of his writing this letter; and it may be also true that he had in his mind the additional purpose of laying the foundation for a charge of desertion against her in case she refused his overtures; but, while these considera-

tions might reflect upon the question of his good faith, they may not be regarded as conclusive that his motive was sinister.

There is nothing in the evidence reflecting upon the real motive, other than plaintiff's declaration that he extended the invitation with the intention that defendant should accept it, and her declaration that she did not accept it, because she did not regard it as made in good faith. It contains no apology for his conduct in charging her with adultery in his former action for divorce; nor is there in it any express plea for forgiveness. But he expressed a willingness for a reconciliation, offered to furnish her a home, to resume cohabitation, and to discharge his duties under the law. If it were necessary that he ask condonation for the past, this was clearly implied. She could easily have tested his sincerity by accepting his overtures, and had he then refused to receive her or thereafter proved derelict, her rights as his lawful wife would not have been prejudiced. But she could not capriciously refuse to accept his offer, because it was not couched in the terms which she would have dictated or preferred. As regrettable as may be the fact, the marriage status is in many cases preserved for no higher motive than that of convenience, and where the parties, alienated by friction in the home due to incompatibility of temper or other cause, have been living apart, it is not to be expected in all cases that, when reconciliation is sought, the overtures will be couched in the most affectionate and apologetic terms. Plaintiff did not seek a personal interview with defendant, but certainly no inducement was held out to him to do so in defendant's letter. This letter not only was a distinct rejection of his overtures, but was tantamount to a declaration of hostility. He was not bound to go further and seek a personal interview or concede the extravagant demand made by her that he should put at her disposal his entire income, besides paying over in cash a large sum of money to furnish a home other than the one which he, as the head of the family, had a right to choose, and which, so far as the evidence shows, was reasonably suitable and within the compass

of his income. Upon the face of it, his offer of reconciliation was made in good faith.

Upon the whole case the district court should have found that the original separation was by consent; that the offer of [12] reconciliation was in good faith; that it was capriciously rejected by the defendant; and, as a conclusion of law, that the plaintiff is entitled to the relief demanded.

Counsel in their briefs discussed many questions not at all pertinent to the issues involved in this case. We shall not notice any of them.

The order denying a new trial is affirmed. The cause is remanded to the district court, with directions to set aside the decree, to find in accordance with the conclusions stated above, and to enter a decree in favor of the plaintiff.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. DEENEY, RESPONDENT, v. BUTTE ELECTRIC AND POWER CO., APPELLANT.

(No. 2,954.)

(Submitted March 13, 1911. Decided March 27, 1911.)

[115 Pac. 44.]

Public Service Corporations—Powers Under Franchise—Reasonable Rules—Electricity—Duty to Supply—When—Mandamus—Pleadings—Demurrer—Admissions.

Electricity—Duty of Corporation to Furnish—When.

1. A corporation authorized under a franchise to furnish electricity, gas or the like to the inhabitants of a city may be compelled to furnish it to all persons along its lines who offer to, and do, comply with its reasonable rules and regulations

Same—Refusal to Furnish—Rules—Reasonableness.

2. A rule of a public service corporation that one who fails or refuses to pay the price of the commodity furnished when due may be refused further service, is reasonable.

Pleadings—Demurrer—What Admitted.

3. The rule that by interposing a demurrer to an answer the pleader admits the truth of its allegations includes only facts properly pleaded, and does not extend to mere conclusions of law or inferences from facts not pleaded or conclusions drawn therefrom, even if alleged in the pleading.

Electricity—Refusal to Furnish—Theft of Gas—Mandamus.

4. Where the answer of defendant company in a proceeding in *mandamus* to compel it to furnish electricity to relator, failed to allege that it also had a gas franchise, a rule that it would not furnish electricity to one who had stolen gas from its mains until all reasonable bills therefor had been paid was not one which it had a right under its electricity franchise to adopt in protection of its gas business, and was therefore no defense to its refusal to supply relator with electric light.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

MANDAMUS by the state, on the relation of William Deeney, against the Butte Electric and Power Company. Judgment for relator, and respondent appeals. Affirmed.

Messrs. Maury & Templeman, and Mr. J. O. Davies submitted a brief in behalf of Appellant. Mr. J. L. Templeman argued the cause orally.

A writ of mandate is an extraordinary writ, never had for the mere asking, never granted in doubtful cases, never granted before the right thereto is clearly shown, and then only when tempered by a wise discretion of the court. To treat the writ otherwise would soon destroy its efficiency as a distinct portion of our jurisprudence. (*State ex rel. Beach v. District Court*, 29 Mont. 265, 74 Pac. 498.) While the remedy by *mandamus* is not equitable, but strictly legal, yet by analogy to the principles prevailing in courts of equity, it is a uniform requirement that the relator in seeking this remedy must come into court with clean hands. Hence, if the proceedings have been tainted with fraud, or if the relator has, through his neglect, lost the benefit of a legal remedy to which he was once entitled, relief should be denied, however meritorious the proceeding may be on other grounds. (2 Spelling on Extraordinary Remedies, 2d ed., sec. 1380.) And in two instances at least has this court applied

equity maxims in *mandamus* proceedings. (See *Territory ex rel. Largey v. Gilbert*, 1 Mont. 371; *State ex rel. Beach v. District Court, supra.*)

We urge that the record shows such taint on the part of Mr. Deeney in the matter of his claimed grievance against the company as precludes his right to mandatory relief. His case is not unlike the case of a citizen who caused a nuisance to exist upon a public street and then sought to compel the city to remove the same by *mandamus*. The writ was denied. (See *Speed v. City of Louisville*, 15 Ky. Law Rep. 400.)

In Montana, we know of no statute authorizing public service corporations to shut off service to a customer for nonpayment of bills. However, sections 8659 and 8661, Revised Codes, make it larceny to take either gas or electricity of a public service corporation in a clandestine manner. After a careful consideration of the authorities, we conclude that without express legislation upon the subject, a public service corporation has the right to disconnect service for nonpayment of bills upon a rule duly promulgated in the premises. (See *Mackin v. Portland Gas Co.*, 38 Or. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596; *State ex rel. Latshaw v. City of Duluth*, 105 Minn. 472, 127 Am. St. Rep. 581, 117 N. W. 827; *Tacoma Hotel Co. v. Tacoma Light & Water Co.*, 3 Wash. 316, 28 Am. St. Rep. 35, 28 Pac. 516, 14 L. R. A. 669, and note.)

In behalf of Respondent, there was a brief by *Messrs. Breen & Jones*. *Mr. H. K. Jones* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The purpose of this application was to compel the defendant to furnish to the relator electricity to light his residence in the city of Butte. In his affidavit the relator alleges that he is a resident of that city, and defendant is a corporation organized and existing under the laws of the state of New Jersey, and authorized to do business in the state of Montana; that it is and

has been engaged in furnishing electricity to the city of Butte and its inhabitants under a franchise granted to its predecessor in interest by ordinance duly enacted by the city council on July 27, 1883; that, under the provisions of the ordinance, it has the right to extend its lines of wires along the streets and alleys of the city, and is required to furnish electricity to the city and its inhabitants for lighting purposes whenever demand is made for it and upon reasonable terms; that the house in which the relator resides is fitted with wires to receive electricity for domestic use; that the defendant has a power line along an alley through the block in which the relator's house is situated, by means of which it for a long time has been delivering electricity to the persons residing in the block; that heretofore and until October 19, 1910, the wires in relator's house were connected with the defendant's line, and electricity was delivered to him for lighting purposes; that relator paid all bills due to the defendant for its service, and complied with all of its reasonable rules regarding the use of electricity; that on the date mentioned the defendant wrongfully caused the connection between his line and relator's house to be severed, and unlawfully refused to furnish the relator with electricity; that, though demand was made for the restoration of the connection and service, it was refused, and that the relator has been damaged by being compelled to resort to other inferior means of lighting his house, to the amount of \$1,000, and to pay counsel fees and costs to the amount of \$560.20. Judgment is demanded that a peremptory writ issue requiring defendant to furnish the relator with electricity, and awarding him such sum in the way of damages as will compensate him for the injury and loss suffered.

The defendant's answer admits all the material allegations in the affidavit, except as to the damages. These latter it denies. As a justification for its action and as cause why relator is not entitled to relief, it alleges the following: "That for more than one year last past, and next before the nineteenth day of October, 1910, this defendant has been a public service corporation, and at all times engaged in furnishing and supplying to the

citizens of and residents within the city of Butte in Silver Bow county, Montana, under lawful permission so to do, by means of pipes, gas for fuel and other domestic purposes and lighting purposes. That for the period, full and entire, of twelve months next preceding the nineteenth day of October, 1910, the said William E. Deeney used for fuel purposes in his said residence gas of this defendant by means of a secret and furtive and clandestine connection with the mains and pipes of this defendant. That this defendant had no notice or knowledge of the said use by the said W. E. Deeney of its gas. That the said W. E. Deeney was during the said period of twelve months next preceding October 19, 1910, continually guilty of larceny of this defendant's gas, and using the same for fuel purposes. That the reasonable value and price of the said gas so used by the said W. E. Deeney in his said residence is more than the sum of \$50. That no part of the said sum of \$50 has ever been paid by the said W. E. Deeney, or by anyone in his behalf, to this defendant for its said gas so used by him. That demand has been made on the said Deeney before the institution of this special proceeding of a civil nature by him that he pay the reasonable value and price of the said gas so furtively used by him, and the property of and made by this defendant. That he refused to pay, and failed to pay, anything at all for the use of the same. That when he was so using the gas of this defendant he intended never to pay for any of the same, and intended to continue to use the same clandestinely and without paying for the same. That this defendant has had for the period of more than one year continuously a rule that it will not serve electricity to anyone who steals its gas, and that it will not sell gas to anyone who steals its electricity until all reasonable bills and charges for both gas and electricity are paid to the company, this defendant. That such rule is a reasonable rule and regulation, as this defendant avers, and without this rule persons of the disposition to do so get, and there are some in Butte who would obtain, the products of gas and electricity furnished to the public by this defendant without being required to pay or paying for the same." To this answer

the court sustained a general demurrer, and, after a hearing on the question of damages, rendered judgment that the writ issue, and that the relator recover damages to the amount of \$1, together with costs of the proceeding. The defendant has appealed. The one question submitted for decision is whether the answer alleges facts sufficient to constitute a defense.

It is conceded by defendant—and the concession is proper—that a company authorized under a franchise to carry on a [1] business public in its nature, such as furnishing electricity to the inhabitants of a city, may be compelled to furnish it to all persons along its lines who offer to, and do, comply with its rules and regulations. (*State ex rel. Milsted v. Butte City Water Co.*, 18 Mont. 199, 56 Am. St. Rep. 574, 44 Pac. 966, 32 L. R. A. 697; *Shepard v. Milwaukee Gaslight Co.*, 6 Wis. 539 (526), 70 Am. Dec. 479, and note; *Williams v. Mutual Gas Co.*, 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236; *Haugen v. Albina Light & Water Co.*, 21 Or. 411, 28 Pac. 244, 14 L. R. A. 424; *Mackin v. Portland Gas Co.*, 38 Or. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596; *State v. Telephone Co.*, 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; *Crumley v. Watauga Water Co.*, 99 Tenn. 420, 41 S. W. 1058.)

It is likewise properly conceded by the relator that such a company may adopt and enforce whatever rules and regulations, or pursue any course of conduct it may deem necessary to protect its interests, providing they are reasonable, and that a rule [2] that the particular service may be discontinued as to any patron who fails or refuses to pay the price of the service when due is reasonable. (*State ex rel. Milsted v. Butte City Water Co.*, *supra*; *American Waterworks Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610, 64 N. W. 711, 30 L. R. A. 447; *Mackin v. Portland Gas Co.*, *supra*; *Tacoma Hotel Co. v. Tacoma Light & Water Co.*, 3 Wash. 316, 28 Am. St. Rep. 35, 28 Pac. 516, 14 L. R. A. 669.)

These concessions narrow the inquiry down to the specific question: Is the rule upon which the defendant relies a reasonable one? In *State ex rel. Milsted v. Butte City Water Co.*,

supra, it was said: "Certainly the company may make reasonable rules and regulations. Doubtless it may require payments in advance for a reasonable length of time. It may within reasonable limitations cut off the supply of those who refuse to pay water rents due. It may make regulations authorizing an examination of meters in houses at reasonable times or adopt other reasonable rules for the regulation of its affairs. But it has no power to abridge the obligations assumed by it in accepting its franchise to supply an inhabitant of Butte with water, if he pays them for it in advance, and is a tenant and in the possession and occupancy of a house in need of water for general purposes." Accordingly, it was held that a rule under which it would "deal only with the owners of property requiring water to be turned on, or the agents of such owners," was unreasonable, because it was in conflict with its franchise.

By interposing a general demurrer to defendant's answer, the relator admitted the truth of its allegations, and, so far as they state probative facts, this court must assume them to be [3] true. But the rule does not extend to mere conclusions of law or inferences from facts not pleaded or conclusions drawn therefrom, even if alleged in the pleading. It includes only facts properly pleaded. (*McCormick v. Riddle*, 10 Mont. 467, 26 Pac. 202; 31 Cyc. 333; 6 Ency. of Pl. & Pr. 336; Bliss on Code Pleading, sec. 418.)

Defendant contends that it is admitted that it is a public service corporation engaged in supplying the inhabitants of Butte with both gas and electricity, and that it may refuse to sell either to any person who has been guilty of a larceny of the other, so long as he refuses to pay the value of the quantity stolen. For present purposes, and in view of the facts stated by relator in his affidavit, it may be assumed that it sufficiently appears from the answer that the defendant is a corporation engaged in supplying the inhabitants of Butte with electricity, with the powers and privileges conferred by its charter, and a [4] franchise under which it is conducting its business. But it does not follow that it may, under the guise of a rule adopted

ostensibly to secure and protect its interests in rendering this public service, impose restrictions designed to extend the same protection to other business conducted by it having no connection with the franchise granted by the city for a specific purpose. It is not alleged that the defendant possesses a franchise to supply gas to the inhabitants of Butte. So far as appears, its engagement in the manufacture and distribution of gas may be wholly without a franchise. If this be so, this part of its business stands upon the same footing as would dealing by it in electrical fixtures and other merchandise of the same character. No one would contend for a moment that a rule declaring that the defendant would cease to furnish electricity to any person who should be in default of payment of a bill for merchandise of the description mentioned would be within the purview of the powers granted by the franchise. It may be that the defendant has a gas franchise. That it has, however, is at best not a just inference from anything stated in the answer, but rather an inference from facts the existence of which rests altogether in surmise. The allegation on this subject is a mere conclusion. It is a crime to steal gas. (Rev. Codes, sec. 8659.) But the defendant has no more right to use its franchise to protect its private gas business than it would have to protect its private merchandise business.

Upon the facts as presented in this case, the relator was entitled to have the defendant furnish to him electricity upon the same footing with every other citizen. The defendant might prosecute him in the courts for a violation of the law, but could not assume to itself the power to punish him for the violation of a rule which it had no power to adopt. The demurrer was properly sustained.

The judgment is affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

'ALBERTINI, RESPONDENT, v. LINDEN, APPELLANT.

(No. 2,971.)

(Submitted March 14, 1911. Decided March 27, 1911.)

[115 Pac. 31.]

Master and Servant—Action for Wages Due—Amount of Compensation—Evidence—Admissibility—Offer of Proof.**Master and Servant—Action for Wages Due—Evidence—Admissibility.**

1. In an action to recover for services rendered under an oral agreement, the terms of compensation as fixed in which were controverted, evidence showing the income derived from defendant's business was improperly excluded. It was admissible as bearing upon the question of the probability or improbability of the agreement having been made as claimed by plaintiff.

Offer of Proof—Purpose of—When Unnecessary to State.

2. Where competent evidence, offered but rejected, could have but one purpose, the fact that such purpose was not disclosed when the offer was made did not render the court's action justifiable.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Celeste Albertini against Peter Linden, doing business as the Oro Fino Ice Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for a new trial.

Messrs. Maury & Templeman, and Mr. J. O. Davies, submitted a brief. *Mr. H. L. Maury* argued the cause orally.

Messrs. Kremer, Sanders & Kremer submitted a brief in behalf of respondent. *Mr. Alf. Kremer* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover a balance alleged to be due the plaintiff for services rendered to defendant from September 22, 1908, to December 6, 1909, in driving defendant's ice wagon and delivering ice to his customers. There was no controversy as to the rendition or the duration of the services. The dispute was as to the terms of the contract. The evidence was confined

to the testimony of the parties. The plaintiff testified that it was agreed that when he entered defendant's employment that he was to receive \$2.50 per day and his board, except that during such time as it was necessary for the defendant to accompany him for the purpose of instructing him in the business he was to receive \$2 per day only and his board. He testified that defendant accompanied him for the twelve days immediately following the date of his employment, and thereafter required him to go alone. The defendant testified that he hired the plaintiff at a fixed rate of \$60 per month, besides his board, and accompanied him for the purpose of instructing him during the first eighteen days of his employment. It was agreed by both that during the months of June, July, and August, 1909, the defendant voluntarily increased the plaintiff's wages \$10 per month for extra work. Assuming that the plaintiff's statement of the terms of the contract is true, the balance due him is \$324. If defendant's statement be accepted as true, the balance due is \$197.50. It is admitted that defendant tendered this latter amount as payment in full before the action was commenced, and deposited it with the clerk of the district court upon his appearance in the action. The jury found for the plaintiff for the full amount claimed by him. The defendant has appealed from the judgment.

On December 22, 1908, the defendant paid plaintiff \$180, the full amount then due at the rate of \$60 per month. During the following two months, he paid the plaintiff at the same rate. The payments were accepted without objection. The acceptance of these amounts and some other circumstances proven tended to corroborate the defendant's statement as to the terms of the contract. To corroborate him further, his counsel offered to show by plaintiff on cross-examination that the entire amount received for ice delivered by the wagon driven by plaintiff during the month following September 22, 1908, was only \$114.90, and that it was known to both parties at the time the contract was made that the gross receipts during all the winter months would not exceed \$120 per month. Upon objection, this offered

evidence was excluded, and this ruling is the ground of defendant's first assignment of error. The evidence was clearly [1] competent. The rule is generally recognized that where the plaintiff seeks to recover the price of property sold to the defendant, or the value of services rendered to him, upon a special agreement as to the price or value, and there is a controversy as to what the agreement was, it is proper for either party to prove the price of the article or the value of the services, as corroborative of his testimony, and to show the probability that the one or the other agreement was made. (*Barney v. Fuller*, 133 N. Y. 605, 30 N. E. 1007; *Saunders v. Gallagher*, 53 Minn. 422, 55 N. W. 600; *McGawley v. Gannon*, 11 Rob. (La.) 164; *Rauch v. Scholl*, 68 Pa. 234; *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817; 1 Wigmore on Evidence, sec. 392.) Upon an analogous principle, there is no reason why evidence showing the condition of a business or the amount of the income derived from it would not have substantial bearing upon the question whether the owner of it had agreed to pay for services the price claimed by one employed by him in that business. If the rate of compensation alleged as stipulated for in the contract is large enough to absorb substantially the gross income derived from the business, it is surely competent to show this fact as bearing upon the truth of the statement of the parties as to what the agreed rate was, and as tending to show that the owner probably did not make the contract as alleged by the employee. If the condition of defendant's business during the winter months was such as he proposed to show, the contract rate as alleged by him would leave him a small, though substantial, margin for other expenses or for profit. If the price was fixed as alleged by plaintiff, this margin would be substantially all absorbed in payment of wages, leaving nothing to meet the other current expenses or to pay a profit. By the exclusion of this evidence, we are of opinion that the defendant was prejudiced.

It is true that upon defendant's theory of the contract the amount of gross income left would be small; yet this does not demonstrate that his version of it is unreasonable. It is not un-

reasonable to suppose that the rate of wages was fixed with reference to what the average income from the sales made by the plaintiff during the entire season would justify, and hence that defendant's statement was true.

It is argued by counsel for plaintiff that the purpose for which the testimony was offered was not made apparent by the [2] offer itself, and hence that the court did not commit error in its ruling. With this contention we do not agree. The evidence could have had no other purpose than that which we have stated, and that it was competent for that purpose is apparent.

We have examined the one other assignment made by counsel, and concluded that it does not merit special notice.

The judgment is reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

MILLS, ADMINISTRATOR, RESPONDENT, v. OLSEN ET AL.,
APPELLANTS.

(No. 2,980.)

(Submitted March 14, 1911. Decided March 28, 1911.)

[115 Pac. 33.]

Mechanics' Liens—Proof—Presumptions—Application of Credits—Attorneys' Fees—Statutes—Constitution.

Mechanics' Liens—Proceedings to Perfect—Form and Requisites—Statutes.

1. Revised Codes, section 7291, requires that a notice of mechanic's lien shall state under oath that it contains a just and true account of the amount due after the allowance of all credits. Plaintiff's notice of lien set forth with considerable detail the contract between himself and the contractor, the amount of work done, including extra work, the amount of materials furnished, stated the balance claimed to be due, and also stated "that these items are

"correct," and was signed by plaintiff, and bore a jurat reciting that it was subscribed and sworn to before a notary public. *Held*, a sufficient notice.

Same—Matters to be Proved.

2. Where it is admitted by the defendants in a proceeding for the enforcement of a mechanic's lien that plaintiff will testify that the items set out in the claim are correct, there is a *prima facie* case for the plaintiff for the full amount of his claim.

Appeal and Error—Review—Presumptions—Rulings at Trial.

3. Where the evidence in a proceeding for the enforcement of a mechanic's lien is such that it cannot be ascertained how the court and jury arrived at the amount awarded to the plaintiff, the supreme court in disposing of the case will give plaintiff the benefit of the presumption that all contested questions of fact were decided in his favor.

Same—Amount of Lien—Application of Credits.

4. Where a subcontractor employed on defendants' building has had an account with the contractor for work and material on contracts for other buildings, he has no right to credit the contractor on their old account for material which actually went into the defendants' building, since the defendants are entitled to have these amounts credited to their building.

Same—Enforcement—Fees and Costs—Constitutionality of Statute.

5. Revised Codes, section 7166, allowing an attorney's fee to claimants of mechanics' liens, is unconstitutional.

Appeal from District Court, Missoula County; J. Miller Smith, a Judge of the First Judicial District in and for Lewis & Clark County, presiding.

ACTION by F. A. Mills, as administrator of the estate of W. H. Charnley, deceased, against Allen J. Olsen and Fred Johnson, copartners, doing business under the firm name of Olsen & Johnson, and J. T. Lacasse and others. Judgment for plaintiff, and defendants appeal from it and an order denying them a new trial. Modified and affirmed.

Mr. John M. Evans, Mr. John J. Marquette, and Mr. John H. Tolan submitted a brief in behalf of Appellants. *Mr. Marquette* argued the cause orally.

In behalf of Respondent, *Mr. Harry H. Parsons* and *Mr. Albert Besancon* submitted a brief. *Mr. Besancon* argued the cause orally.

The validity and constitutionality of the statute, section 7166, Revised Codes, providing for the taxation of an attorney fee

as part of the costs on foreclosure of a mechanic's lien, has been upheld by this court in the following decisions: *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280; *Helena Co. v. Wells*, 16 Mont. 65, 40 Pac. 78; *Murray v. Swanson*, 18 Mont. 533, 46 Pac. 441; *Hill v. Cassidy*, 24 Mont. 113, 60 Pac. 813. In these cases the provisions of the Montana Constitution invoked by appellants were fully considered and upheld. Decisions of sister states on the question have but little or no weight, but we cite the following as upholding statutes providing for the payment of attorney's fees: *Dell v. Marvin*, 41 Fla. 221, 79 Am. St. Rep. 171, 26 South. 188, 45 L. R. A. 201; *Robertson v. Moore*, 10 Idaho, 115, 77 Pac. 218; *Davis v. Rittenhouse*, 92 Ill. App. 341; *Duckwall v. Jones*, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797; *West v. Badger L. Co.*, 56 Kan. 287, 43 Pac. 239; *Lamb Lumber Co. v. Benson*, 90 Minn. 403, 97 N. W. 143; *Fitch v. Howitt*, 32 Or. 396, 52 Pac. 192; *Little v. Saulsberry*, 40 Wash. 550, 82 Pac. 909; *Greene v. Finnell*, 22 Wash. 186, 60 Pac. 144; as not impairing the obligation of contracts (8 Cyc. 1016), and cases cited; as not denying the equal protection of the laws (8 Cyc. 1076, and cases cited). Nearly all of the cases cited by appellants were decided on this same question, i. e., of statutes making an unjust distinction between classes of suitors. In *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, cited and so much relied on by appellants, we find practically the same condition. The case has no application to a general state statute on the foreclosure of liens that applies equally to all within the state. The case was appealed from the supreme court of Texas, argued *ex parte* in behalf of the railroad company, and a dissenting opinion is written by Mr. Justice Gray, with whom concurred Mr. Chief Justice Fuller and Mr. Justice White. It is not in point on the question raised in the case at bar, and we fail to see how it can have any controlling force in this court. The case was decided on January, 1897, while we find this court upholding the statute of our state as late as April 16, 1900, in *Hill v. Cassidy, supra*.

The protection of neither the state nor the federal Constitution or statutes was invoked by appellant in the trial court. Such questions cannot be raised for the first time on appeal. (*Shewalter v. Missouri Pac. Ry. Co.*, 152 Mo. 544, 54 S. W. 224; *Clark v. Porter*, 162 Mo. 516, 63 S. W. 89; *Hanlon v. Pulitzer Pub. Co.*, 167 Mo. 121, 66 S. W. 940; *Hardin v. City of Carthage*, 171 Mo. 442, 71 S. W. 673; *J. G. Hutchinson & Co. v. Morris Bros.*, 190 Mo. 673, 89 S. W. 870; *Brown v. Missouri K. & T. Ry. Co.*, 175 Mo. 185, 74 S. W. 973; *Shaw v. Goldman*, 183 Mo. 461, 81 S. W. 1223.)

MR. JUSTICE SMITH delivered the opinion of the court.

This action was begun in Missoula county by W. H. Charnley to foreclose a mechanic's lien. After trial Charnley died, and Mills, as his administrator, was substituted. In discussing the case we shall refer to Charnley as the plaintiff. The complaint alleges that the defendants Lacasse were the owners of certain lots in the city of Missoula; that they made a contract with Olsen & Johnson to erect a building thereon; that the latter contracted with Charnley to do the lathing and plastering, for which they promised to pay him at the rate of thirty-six cents per square yard; that Charnley agreed to furnish all materials used by him; that Olsen & Johnson should advance the money necessary to pay for materials as needed, the remainder of the contract price to be paid for as the work progressed; that, if Olsen & Johnson could purchase materials cheaper than could Charnley, they were to do so, and give him the benefit of such reduction in price; that they were to do all hoisting of materials without expense to Charnley, and were to pay him the reasonable value of all extra work; that plaintiff did 17,087 yards of plastering and performed extra work, all of which amounted to the sum of \$6,432.42, no part of which has been paid except the sum of \$3,740.13, leaving a balance due of \$2,692.29, for which amount plaintiff filed and claims a lien upon the building. We shall

refer to the defendants collectively. For answer they admitted that Olsen & Johnson entered into a contract with Charnley to lath and plaster the building at thirty-six cents per square yard; alleged that Charnley was to furnish all material and labor, including water necessary for mixing plaster; denied that Olsen & Johnson were to pay for hoisting materials, but admitted that plaintiff was to have the use of the elevator for that purpose. They denied the amount of work claimed to have been done by him; alleged that the total amount earned under the contract was \$5,439.67, on which they had paid in cash and materials the sum of \$5,960.50, being an overpayment of \$520.83, for which they demand judgment by way of counterclaim. Plaintiff by reply denied all new matter in the answer. The cause was tried to the district court, sitting with a jury. A general verdict for plaintiff in the sum of \$1,348 was rendered, whereupon the court made certain so-called findings of fact which, instead of being of any assistance to this court, are mostly conclusions of law and fact, and entered judgment in favor of the plaintiff for the amount of the verdict, including costs and attorney's fees. From the judgment and an order denying a new trial, defendants have appealed.

1. Appellants' first contention is that plaintiff's notice of lien is fatally defective, in that it fails to state under oath that it contains a just and true account of the amount due him after allowing all credits, as provided by section 7291, Revised Codes. As a matter of fact, the notice of lien sets forth the contract [1] between the parties, the amount of work done, including extra work, and the amount of materials furnished, in considerable detail. It gives the total amount of credits or moneys paid thereon, and states the balance claimed to be due. It also states "that items are correct." It is signed by Charnley, and bears a jurat reciting that it was subscribed and sworn to before Harry H. Parsons, a notary public. We think it is sufficient. (*Black v. Appolonio*, 1 Mont. 342; *McGlaughlin v. Wormser*, 28

Mont. 177, 72 Pac. 428; *Neuman v. Grant*, 36 Mont. 77, 92 Pac. 43; 27 Cyc. 197.)

2. The second contention is that the evidence is insufficient to justify the findings, and that the amount found due the plaintiff is excessive.

At the trial, Mr. Tolan, one of the defendants' attorneys, made this statement: "There is no doubt that the plaintiff will testify that the items set out in this mechanic's lien are correct; that is, with reference to the extra work and all about it." This [2] statement was accepted by the court and opposing counsel, and makes out a *prima facie* case on the part of the plaintiff for the full amount claimed by him. It is assumed in the brief of appellants that the amount claimed for lathing and plastering is correct, and it is then said: "By this assumption respondent would have as the total amount earned by him under the contract and for extras and the other items charged in his lien the sum of \$6,432.42." This amount, then, was fixed at the trial, and the only question is: What credits should have been allowed to the appellants? It will be noted that the jury returned a verdict for about one-half the amount claimed by Charnley. It is impossible to ascertain from the record what particular items of credit they allowed or disallowed. Had proper findings been made in that regard, great assistance would have been afforded this court. Appellants offered in evidence sixteen bank checks drawn by them to the order of plaintiff and others, aggregating \$3,587.35, all of which are now claimed to be undisputed credits on their account. To this statement, however, the respondent does not agree. Charnley testified that he began work about January 1, 1909, and finished about April 1, of the same year; while Olsen declared that material was delivered at the building for him in the latter part of November or 1st of December. It was agreed that plaintiff had performed work for the defendants Olsen & Johnson in the fall of 1908 on two certain other buildings known as the University Library and the Deschamps building. Charnley testified that Olsen & Johnson

were indebted to him for work and labor on these other buildings, and that he gave them credit on these accounts for all moneys paid and materials furnished by them which were not credited by him upon the Lacasse building contract. This was his general statement, repeated many times during the trial. He claimed the right to so apply the payments. No effort was made to show the amounts actually due him on these other contracts.

We have never examined a less satisfactory record, and feel that a proper disposition of the case would be to remand it for a new trial, which action would be taken were it not for the fact that Charnley is dead, and such a course would perhaps result in placing his representative at a disadvantage. And we are also reluctant to order a new trial in view of the circumstance that the appellants here had it in their power to clear matters up in the court below by requesting a special verdict and specific findings of fact. It is impossible from the record to tell whether Charnley had any credit balance in his favor on either the university library building contract or the Deschamps building. He admitted receiving two carloads of cement from Olsen & Johnson. As to this cement, which he claims was sixty tons at \$11 per ton, he first said that he gave credit for it on the university library work and the Deschamps building. Afterward he said that he allowed it on "this Lacasse job contract," and still later he testified that he "did not give them credit for the amount paid for the plaster on his job in the Lacasse building." The court ruled, as we understand it, that Olsen & Johnson were entitled to credit for the whole of it in any event.

Having carefully studied the evidence, we are unable to ascertain how the court and jury arrived at the amount awarded the plaintiff. His counsel offers no figures to justify it. Consequently it is of no significance. We shall therefore dispose of [3] the case in a manner which seems to us substantially correct, giving the respondent the benefit of the presumption that all contested questions of fact were decided in his favor.

Charnley testified that he had credited Olsen & Johnson with the following cash payments:

1.	Balance overdrawn on previous contracts.....	\$ 380 38
2.	January 9, 1909, Cash.....	250 00
3.	January 6, 1909, "	300 00
4.	January 23, 1909, "	600 00
5.	January 30, 1909, "	282 50
6.	February 1, 1909, "	200 00
7.	February 13, 1909, "	200 00
8.	February 20, 1909, "	200 00
9.	February 27, 1909, "	100 00
10.	April 3, 1909, "	135 00
11.	March 22, 1909, "	175 00
12.	January 31, 1909, amount paid plasterer.....	53 25
13.	January 2, 1909, amount paid lathers.....	66 60
14.	* * * amount paid for lime.....	32 50
15.	April 20, 1909, check	165 00
		<hr/>
		\$3,140 23

Olsen testified that Charnley received the following cash payments:

1.	December 16, 1908, check for freight on plaster..	\$ 210 00
2.	February 26, 1909, check.....	100 00
3.	April 2, 1909, "	135 00
4.	January 2, 1909, "	50 00
5.	January 9, 1909, "	282 50
6.	January 9, 1909, "	250 00
7.	January 16, 1909, "	200 00
8.	February 5, 1909, "	200 00
9.	January 23, 1909, "	600 00
10.	January 30, 1909, "	550 00
11.	February 20, 1909, "	350 00
12.	February 13, 1909, "	200 00
13.	March 20, 1909, "	175 00
14.	April 20, 1909, "	165 00
15.	April 12, 1909, "	53 25
16.	April 2, 1909, "	66 60
		<hr/>
		\$3,587 35

Omitting for the moment the check for \$210 paid for freight on plaster, we find that the amounts and dates substantially correspond in the two statements, with three exceptions, *viz.*: (a) Charnley denies that the check for \$50 given on January 2 was a credit on the Lacasse building; (b) he gives no credit for the two checks for \$550 and \$350 given on January 30 and February 20, respectively; and (c) Olsen does not mention the payment of \$300 on January 6. We think the \$50 check of January 2 should be charged against the plaintiff because he testified that the plasterers on the university library and Deschamps buildings finished their work on December 24, 1908, on which date he received \$50 to pay them off. He then said that the check for \$50 received on January 2 was given to him for the same purpose, "just before Christmas," and finally admitted that he did not know what it was for unless it was for the plasterers on the Deschamps building, "because there is where the plasterers were working." In view of the fact that the plasterers on the Deschamps building had finished their work, and that plastering on the Lacasse building had begun, it is manifest that, if he paid plasterers with the check, the plasterers referred to were employed on the Lacasse building. He made no attempt to deny that he received a check for \$550 on January 30, and another for \$350 on February 20. When he opened his account with Olsen & Johnson for the Lacasse building about the 1st of January, 1909, he gave them credit for \$380.28, overpaid on the two other buildings; so that it is clear that the sum of these two checks, *viz.*, \$900, should be credited to Olsen & Johnson on the Lacasse contract, as Olsen testified.

A great deal of testimony was taken as to whether the \$210 check of December 16, 1908, should be charged against Charnley. He testified, in substance, that he received a car-load of cement from one Dally in Spokane, and that this check was given him by Olsen & Johnson to pay the freight thereon. He further said, however, that he told them he would not consent to be charged for cement any greater sum than he was obliged to pay Dally, *to-wit*, \$11 per ton laid down in Missoula. And he

said he purchased this cement at \$10.50 per ton f. o. b. Missoula. He was manifestly in error in this, because if the cement was to be laid down in Missoula, free of freight charges, there would have been no necessity for him to get \$210 from Olsen & Johnson to pay such charges. Olsen testified that the price of cement in Missoula varied from \$14 to \$16 per ton. He said that a rebate of \$2 per ton was allowed for the return of the sacks, so that the net price of \$16-cement was \$14. Again, in his account filed with his notice of lien, Charnley credited the defendants with one and one-half tons of cement at \$14 per ton. Again, if the freight on sixty tons of cement amounted to \$210, the charges on one ton would be \$3.50, which, added to the price named by Dally, of \$10.50, makes \$14 per ton, in Missoula, which agrees with all the testimony on the subject. This item of \$210 should therefore be charged to the plaintiff.

The sum of the additional cash payments which we think should be charged to Charnley, as above stated, *viz.*, \$210, \$50, \$550, and \$350, is \$1,160, which, added to the amount he admitted having received (\$3,140.23), makes \$4,300.23. He also received lime to the amount of \$48.50, for which he credited them with only \$32.50. The balance of \$16 should be charged to him. If we accept his last statement on the subject, he used sixty tons of cement on the Lacasse building, and gave them credit on other contracts for \$660. He says he credited them with all they furnished; but in this he is mistaken, for the record shows that he used all they delivered to him, which was 1,416 sacks. This cement at \$14 per ton would come to \$991.20. As he credited but \$660, the balance of \$331.20 should be now credited.

Let us revert for a moment to his original statement of account. He there gave credit for \$3,740.13, of which \$3,140.23 was cash, leaving a balance of \$599.90, which must have been for material; and this material must necessarily have been lath and common lumber, as he received no other, except as above stated. The total value of the lath furnished him was \$775.72, and common lumber \$29.28, making a total of \$805. He swore that he credited it all on the old contracts, but this statement

cannot be true. The difference, or \$205.10, is all that could have been so credited. He should, then, be charged with the value of material (lath and common lumber), which he admits in his pleadings and testimony was a proper credit to Olsen & Johnson, to-wit, \$599.90.

Summary.

Cash to be credited to Olsen & Johnson.....	\$4,300	23
Balance on lime account	16	00
Balance on cement account	331	20
Value of material admitted to be a proper credit.....	599	90
Total	\$5,247	33

The difference between \$6,432.42, the total amount due under his contract, and \$5,247.33, credits allowed Olsen & Johnson, is \$1,185.09, or \$162.91 less than the amount of the verdict. In this sum the verdict against Olsen & Johnson and the judgment against them are excessive.

So far as the lien is concerned, Charnley had no right to [4] credit Olsen & Johnson on their old account for material which actually went into the Lacasse building. The owners were entitled to have these amounts credited to the building. These credits should be:

Lath and common lumber.....	\$805	00
Lime	16	00
Cement	991	20
Add to this cash received.....		\$1,812 20
Total	4,300	23

Deduct this amount from \$6,432.42, and we have \$319.99, the amount which is a lien against the building.

It is contended that section 7166, Revised Codes, giving lien claimants an attorney's fee, is unconstitutional. This court in *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280, held a similar statute valid. Since that case was decided, however, the supreme court of the United States in *Gulf etc. R. Co. v. Ellis*,

165 U. S. 150, 17 Sup. Ct. 225, 41 L. Ed. 666, the supreme court of California in *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 119 Am. St. Rep. 193, '88 Pac. 982, 17 L. R. A., n. s., 909; *Stimson Mill Co. v. Nolan*, 5 Cal. App. 754, 91 Pac. 262; *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983; *Merced Lumber Co. v. Bruschi*, 152 Cal. 372, 92 Pac. 844; *Hill v. Clark*, 7 Cal. App. 609, 95 Pac. 382; *Farnham v. California Safe Deposit Co.*, 8 Cal. App. 266, 96 Pac. 788; *Los Angeles Pressed Brick Co., v. Higgins*, 8 Cal. App. 514, 97 Pac. 414, 420, and the supreme court of Colorado in *Davidson v. Jennings*, 27 Colo. 187, 83 Am. St. Rep. 49, 60 Pac. 354, 48 L. R. A. 340, have held like enactments to [5] be void. To the same effect are the decisions in *Grand Rapids Chair Co. v. Remells*, 77 Mich. 104, 43 N. W. 1006; *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *Railroad Co. v. Morris*, 65 Ala. 193; *Paddock v. Missouri Pac. Ry. Co.*, 155 Mo. 524, 56 S. W. 453; *Phenix Ins. Co. v. Hart*, 112 Ga. 765, 38 S. E. 67; *Openshaw v. Halfin*, 24 Utah, 426, 91 Am. St. Rep. 796, 68 Pac. 138; *Atkinson v. Woodmansee*, 68 Kan. 71, 74 Pac. 640, 64 L. R. A. 325; *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 53 Am. St. Rep. 622, 41 N. E. 263, 29 L. R. A. 386; *Randolph v. Builders etc. Supply Co.*, 106 Ala. 501, 17 South. 721; *West v. Wabash R. Co.*, 118 Mo. App. 432, 94 S. W. 310. We think the reasoning of these cases is unanswerable. In some of the states statutes giving special protection to laborers and mechanics have been upheld, while in others similar statutes have been declared unconstitutional. We have no occasion to pass upon the constitutionality of such statutes in this opinion, and do not do so. Suffice it to say that our statute extends the benefit to materialmen, contractors, and others who do not come within the reason that may justify legislation for the protection of laborers and mechanics.

The order denying a new trial is affirmed, and the cause is remanded to the district court of Missoula county with directions to modify its judgment against Olsen & Johnson by deducting therefrom the sum of \$162.91. The balance is affirmed. That part of the judgment relating to the lien upon the building

is ordered modified by reducing the amount of the lien to the sum of \$319.99, for which amount alone it is affirmed in this regard. That portion thereof relating to attorneys' fees is ordered stricken out. Each party shall pay his own costs in this court.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

FLAHERTY, RESPONDENT, *v.* BUTTE ELECTRIC RAILWAY CO. ET AL., APPELLANTS.

(No. 2,959.)

(Submitted March 13, 1911. Decided March 28, 1911.)

[115 Pac. 40.]

Personal Injuries—Street Railways—Pleadings—Amendments—Respondeat Superior—Negligence—Proximate Cause—Complaint—Sufficiency—Minors—Excessive Verdict.

Pleadings—Amendments.

1. Where amendments of pleadings do not change the nature of the action or mislead the adversary to his prejudice, their allowance is the rule, their denial the exception.

Same.

2. Plaintiff in a personal injury action was properly allowed, after reversal of a judgment in his favor and before a new trial was had, to substitute a specific act of negligence for the one previously relied upon. In such a case so long as the injury complained of is the same in the amendment as that originally declared upon, the amended pleading is not open to the charge that it introduced a different cause of action.

Personal Injuries—*Respondeat Superior*—Complaint.

3. While, in a personal injury action where recovery is sought for a negligent act of a servant under the doctrine of *respondeat superior*, the fact that the relationship of master and servant existed at the time of the injury should be pleaded, the absence of such a direct allegation will not be held sufficient to reverse the judgment, if facts are alleged from which it may fairly be inferred that the relationship did so exist.

Same—Street Railways—Duty of Defendant—Breach—Complaint.

4. The complaint in an action against a street railway company alleging that the car which ran over and injured plaintiff was being

operated in a public and much used street in a city, and that the motorman failed to keep a vigilant or proper lookout, whereby he might have seen the plaintiff before he came into a place of danger, sufficiently stated the duty cast upon defendant's motorman to keep a lookout for pedestrians, and its breach.

Same—Complaint—Proximate Cause.

5. The act of negligence resulting in plaintiff's injury was alleged to have been the failure of defendant's motorman to keep a proper lookout. *Held*, that this allegation and the further one that by reason of such negligence plaintiff was injured, sufficiently showed the causal connection between the alleged negligence and the injury.

Same—Unavoidable Accident—Question for Jury.

6. The question whether because the motorman's vision was so obscured by a passing wagon or a dust storm, claimed to have prevailed at the time of the accident, as to interfere with his attempt to keep a proper lookout, the injury was unavoidable, was properly submitted to the jury, the evidence presenting a sharp conflict in this respect.

Same—Excessive Verdict.

7. *Held*, that a verdict of \$25,000 for injuries to a minor less than three years old at the time of the accident, which resulted in the amputation of one of his limbs at the hip, was excessive, and a new trial ordered unless plaintiff consent to a scaling thereof to the sum of \$12,500.

Appeal from District Court, Silver Bow County; J. M. Clements, a Judge of the First Judicial District, in and for Lewis & Clark County, presiding.

ACTION by Wilfred H. Flaherty, by Laura S. Flaherty, his guardian *ad litem*, against the Butte Electric Railway Company and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed and remanded for a new trial *nisi*.

In behalf of Appellants, there was a brief by *Mr. George F. Shelton, Mr. Peter Breen, and Mr. Charles A. Ruggles*. *Mr. Ruggles* argued the cause orally.

The appellants predicate error upon the court's granting plaintiff's motion to file an amended complaint. Amendments must not depart from the original cause of action, and must not state a new and distinct cause of action in place thereof. The test laid down in the cases as to what is the statement of a new cause of action, and hence as to what would not be a proper amendment, is said to be whether or not the cause of action attempted to be set up in the amendment would or would

not be barred by a recovery upon the allegations as they stand. (See *Norris v. Pollard*, 75 Ga. 358; *Carpenter v. Huffsteller*, 87 N. C. 273; *Allen v. Brooks*, 88 Wis. 265, 60 N. W. 253; *Scovill v. Glasner*, 79 Mo. 449; *Flanders v. Cobb*, 88 Me. 488, 51 Am. St. Rep. 410, 34 Atl. 277.) We are aware that this court has adopted a somewhat liberal view with reference to amendments, as stated in the case of *Leggat v. Palmer*, 39 Mont. 302, 102 Pac. 327. There the court cites, among other cases: *Merrill v. Miller*, 28 Mont. 134, 72 Pac. 423, and *Borden v. Lynch*, 34 Mont. 503, 87 Pac. 609. In these cases, however, in spite of the fact that the court adopts the liberal rule with reference to amendments, the qualification to the rule is laid down: "Where they do not change the nature of the action," etc. The cause of action attempted to be stated in the amended complaint was still a distinct departure from that upon which the plaintiff began his action.

The complaint does not state facts sufficient to constitute a cause of action, for the reason (a) that there is no sufficient allegation of any relation of master and servant, or employer and employee, between the defendant Butte Electric Railway Company and the defendant George Le Sage. In an action against a master to recover for injuries caused by a servant, the complaint must show that the relationship of master and servant existed at the time of the injury. (13 Ency. of Pl. & Pr. 922; 26 Cyc. 1571, citing *Sagers v. Nuckolls*, 3 Colo. App. 95, 32 Pac. 187, and *Barowski v. Schultz*, 112 Wis. 415, 88 N. W. 236.) In the latter case the court held that where the complaint alleged that plaintiff was on defendant's premises at the latter's request for the purpose of doing certain work on a roof, it does not show that plaintiff was in defendant's employ. So here the mere allegation that Le Sage was performing certain acts "with the knowledge and consent" of defendant corporation does not show positively that Le Sage was a servant or employee of the company. (b) There is no allegation of any facts sufficient to constitute negligence on the part of the defendants, or either of them, within the rule prescribed by Revised Codes, section 6532,

or within that rule as so plainly interpreted in *Pullen v. City of Butte*, 38 Mont. 194, 99 Pac. 290, 21 L. R. A., n. s., 42. In the complaint under consideration, there is no allegation that any particular lookout was required as a matter of duty, nor the statement of any facts from which the court could infer that a particular kind of lookout was required under the circumstances, and that Le Sage failed to perform such duty. The allegation, therefore, that Le Sage failed to keep a lookout is plainly no fuller nor more satisfactory, as a statement of facts, than the allegation that the city of Butte allowed a certain sidewalk to be out of repair and in a defective condition. This being an action by a person not a passenger, the plaintiff can rely upon no presumption or general rule whatsoever to help him, but must be relegated solely to the very facts which he has seen fit to set forth in his complaint. And this duty the plaintiff has neglected to perform. (*Faris v. Hoberg*, 134 Ind. 269, 39 Am. St. Rep. 261, 33 N. E. 1028; *Maenner v. Carroll*, 46 Md. 193; *Thiele v. McManus*, 3 Ind. App. 132, 28 N. E. 327; *Sweeny v. Old Colony & N. R. Co.*, 10 Allen (Mass.), 368, 87 Am. Dec. 644; *Thompson v. Flint & P. M. R. Co.*, 57 Mich. 300, 23 N. W. 820; *Ward v. Chicago & N. W. R. Co.*, 61 Ill. App. 530; *Chicago & A. R. Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680, affirming 70 Ill. App. 550; *Jensen v. Wetherell*, 79 Ill. App. 33; *Angus v. Lee*, 40 Ill. App. 304; *Consumers' Electric Light & Street R. Co. v. Pryor*, 44 Fla. 354, 32 South. 797; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718.) In 14 Ency. of Pl. & Pr. 332, the rule is stated as follows: "A general averment that it was the defendant's duty to do the thing alleged to have been omitted is insufficient; the facts or circumstances from which the law will imply the duty should be stated." (*Bucci v. Waterman*, 25 R. I. 125, 54 Atl. 1059; *Pittsburg etc. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 660; *Funk v. Pipe*, 50 Ill. App. 163; *Jeffersonville etc. Ry. Co. v. Dunlap*, 29 Ind. 426; *Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550; *Taylor v. Atlantic etc. Co.*, 2 Bosw. (N. Y.) 106; *Kennedy v. Morgan*, 57 Vt. 46; *Priestly v. Fowler*, 3

Mees. & W. 1.) There is no sufficient allegation of any causal connection between any acts of defendants, or either of them, and plaintiff's alleged injuries. (See *Lynch v. Great Northern Ry. Co.*, 38 Mont. 511, 100 Pac. 616.)

That a street railway company cannot properly be held responsible for the death of a child two and one-half years old which has suddenly and unexpectedly run upon the track five or ten feet ahead of an electric car moving rapidly through a narrow street, and that in such a case the fact that the car was not brought to a full stop within as short a distance as the evidence shows it is possible to bring such a car to a full stop, is insignificant, in view of the fact that even if it had been done, the injury would have resulted. (See *Miller v. St. Charles Street Ry. Co.*, 114 La. 409, 38 South. 401; *Culbertson v. Crescent City Ry. Co.*, 48 La. Ann. 1376, 20 South. 902; *Hirschman v. Dry Dock etc. Co.*, 29 Misc. Rep. 315, 61 N. Y. Supp. 304; *Adams v. Nassau Electric R. Co.*, 41 App. Div. 334, 58 N. Y. Supp. 543; *Callery v. Easton Transit Co.*, 185 Pa. 176, 39 Atl. 813; *Louisville Ry. Co. v. Edelen*, 123 Ky. 629, 96 S. W. 901; *Benson v. C. P. Ry. Co.*, 98 Cal. 45, 32 Pac. 809, 33 Pac. 206; *Baltimore etc. Co. v. State*, 71 Md. 590, 18 Atl. 969; *Burke v. Broadway etc. Co.*, 49 Barb. 529; *Funk v. Electric Traction Co.*, 175 Pa. 559, 34 Atl. 861.) The fact of injury is not enough. Negligence of the company must be shown. (*Roller v. Sutter St. Ry. Co.*, 66 Cal. 230, 5 Pac. 108; *Squire v. Central Park Ry. Co.*, 4 Jones & S. 436.)

Messrs. Canning & Keating, and *Mr. J. E. Healy*, submitted a brief in behalf of Respondent. *Mr. Healy* argued the cause orally.

The case of *Frost v. Witter*, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 707, contains a very full review of the question of amendments to pleadings, and the filing of amended pleadings, and the extent to which the same may go. The case is very full in its discussion of the authorities, and is cited as a leading case upon this topic. Within the rules there laid down, there was

no change of the nature and scope of the action, nor the introduction of a wholly different cause of action. (Pomeroy's Code Remedies, 4th ed., secs. 346, 348, 412, 414, 456, 458; Estee's Pleadings, sec. 128; *Buchner v. Malloy*, 155 Cal. 253, 100 Pac. 688.) The amendment here in no manner changed the cause of action, for the cause of action consists of that which produces the necessity of bringing the action. (Words and Phrases, 1015; *Doyle v. Southern Pac. Co.* (Or.), 108 Pac. 211; Sutherland on Code Pleading, secs. 789, 798, 799.) This court on the former appeal indicated what in its opinion the negligence consisted of, and an amendment made in accordance with such pointing out could not surprise or prejudice or in any way mislead the defendant. (*Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918.) Amendments are the rule, their denial the exception. (*Leggat v. Palmer*, 39 Mont. 302, 102 Pac. 329.) A mistake of law is such a mistake as will be permitted to be removed by amendment. This court held that the lower court and plaintiff as well were mistaken as to law, though it was conceded that there was authority in their favor. (*Green v. Gavin*, 11 Cal. App. 506, 105 Pac. 761; *Dent v. Superior Court*, 7 Cal. App. 683, 95 Pac. 672.) The amendment was properly made and allowed under all weight of authority, and particularly under the system of amendments allowed under a liberal Code practice. (29 Cyc. 1043, note 52; Abbott's Brief on Pleadings, 1802; *Tanner v. Harper*, 32 Colo. 156, 75 Pac. 404; *Johnson v. Johnson*, 30 Colo. 402, 70 Pac. 692; *Minn. Threshing Co. v. Currey*, 75 Kan. 365, 89 Pac. 688; *Lampe v. Jacobsen*, 46 Wash. 533, 90 Pac. 654; *Strauhal v. Asiatic Co.*, 48 Or. 100, 85 Pac. 230; *Ridings v. Marion County*, 50 Or. 30, 91 Pac. 22; *Fell v. U. P. Ry. Co.*, 32 Utah, 101, 88 Pac. 1003, 13 Ann. Cas. 1137; *Doyle v. S. P. Co.* (Or.), 108 Pac. 201; *Dempster v. O. S. L. Co.*, 37 Mont. 335, 96 Pac. 717; *Kent v. Zimmerman*, 48 Cal. 388, 110 Pac. 189; *Hershfield v. Aiken*, 3 Mont. 442; *Ramsey v. Cortland Cattle Co.*, 6 Mont. 498, 13 Pac. 247.) Complaint may be amended although it changes the cause of action and substitutes another belonging to a different class, where the result sought to be reached is the

same. (*Deyo v. Morss et al.*, 144 N. Y. 216, 39 N. E. 81; *Frost v. Witter, supra.*) By pleading over after demurrer overruled, the defendant waived all questions arising upon the special demurrer interposed. (*Garver v. Lynde*, 7 Mont. 108, 14 Pac. 697, and cases cited; *Sams Auto. Car Coupling Co. v. League*, 25 Colo. 129, 54 Pac. 643; *Gassen v. Bower*, 72 Cal. 555, 14 Pac. 206; *Rooney v. Gray*, 145 Cal. 753, 79 Pac. 523.)

It is the common-law duty of a motorman running a streetcar in a populous town or city to keep a lookout for persons rightfully on the track and liable to be run over by the cars. (36 Cyc. 1520; *Anniston E. Co. v. Elwell*, 144 Ala. 317, 42 South. 45; *Barstow v. Capital Tract Co.*, 29 App. D. C. 362; *Louisville etc. Co. v. Byer*, 130 Ky. 437, 113 S. W. 463; Thompson on Negligence, secs. 1382-1387, 1424-1428; *Haase v. Morton*, 138 Iowa, 205, 115 N. W. 921, 16 Ann. Cas. 350; *Greene v. Louisville*, 119 Ky. 862, 84 S. W. 1154, 7 Ann. Cas. 1127, note; *Cornoviski v. St. Louis Co.*, 207 Mo. 263, 106 S. W. 51; *McFarland v. Elmira etc. Co.*, 136 App. Div. 194, 120 N. Y. Supp. 292; *Murphy v. St. Joseph etc. Co.*, 138 Mo. App. 436, 122 S. W. 334; *United Ry. Co. v. Carneal*, 110 Md. 211, 72 Atl. 771; *Engvall v. Des Moines City R. Co.* (Iowa), 121 N. W. 12; *Wilmington etc. Ry. Co. v. Truman* (Del.), 72 Atl. 983.)

In the lower court and in this court it has been claimed that the plaintiff was a trespasser upon the defendant's right of way and franchise, and that the case must, from the standpoint of the complaint and from the evidence as well, be viewed in that light. We deem such a contention to be clearly erroneous. The right of a railway in a street is only an easement to use the highway in common with the public. It has no exclusive right to travel upon its track, and it is bound to use the same care in preventing a collision as is the driver of a wagon or other vehicle. (*Rascher v. East Detroit & G. Ry. Co.*, 90 Mich. 413, 30 Am. St. Rep. 447, 51 N. W. 463; *Adolph v. Railway Co.*, 65 N. Y. 555; *Government St. Ry. Co. v. Hanlon*, 53 Ala. 70; *Shea v. Railway Co.*, 44 Cal. 414; 27 Am. & Eng. Ency. of Law, 57; 36 Cyc. 1490-1513.) No duty need be alleged when the facts

pleaded show that the law itself under the facts imposes a duty. (*Wells v. Gallagher*, 144 Ala. 363, 113 Am. St. Rep. 50, 39 South. 747, 3 L. R. A., n. s., 759; *City of Lafayette v. West*, 43 Ind. App. 325, 87 N. E. 550; *Pittsburgh etc. Ry. Co. v. German Ins. Co.*, 44 Ind. App. 268, 87 N. E. 995; *Apperson v. Lazro*, 44 Ind. App. 186, 87 N. E. 97, 88 N. E. 99; 29 Cyc. 567 (b), 569 (f), 572, 573 (g).)

It is said that there is no connection shown as to the defendant corporation from the allegations in the complaint; we consider this contention unsound under Revised Codes, 5077 and 5450, and also that the point is adversely decided against the defendants in *Rand v. Butte Electric Ry. Co.*, 40 Mont. 398, 107 Pac. 87. The facts pleaded show the corporation was operating the street-car system and that Le Sage was in charge of the car and operating it as motorman with the knowledge and consent of defendant corporation. These allegations are inconsistent with Le Sage being a lessee or independent contractor, and are only consistent with the relationship of master and servant, none other. (1 Shearman & Redfield on Negligence, 5th ed., sec. 158, and cases there cited.)

The objection that there is not any causal connection between the injury and the negligence which caused it is captious and unfounded. (See *Doyle v. Southern Pacific Co.* (Or.), 108 Pac. 201; *Stephenson v. Southern Pacific Co.*, 102 Cal. 143, 34 Pac. 619, 36 Pac. 407; *Townsend v. City of Butte*, 41 Mont. 410, 109 Pac. 969; *Board etc. of Boone County v. Mutchler*, 137 Ind. 140, 36 N. E. 534; *Manning v. App. Con. Co.*, 149 Cal. 35, 84 Pac. 657; *Fisher v. Western Fuse & Ex. Co.*, 12 Cal. App. 739, 108 Pac. 659; *Galveston Elec. Co. v. Wilkins* (Tex. Civ. App.), 121 S. W. 538; *Perryman v. Chicago City R. Co.*, 242 Ill. 269, 89 N. E. 980; *Mobile etc. Co. v. Hartwell*, 163 Ala. 77, 50 South. 883; *Engvall v. Des Moines Ry. Co.* (Iowa), 121 N. W. 12; *Sherman v. Southern Pacific Co.* (Nev.), 111 Pac. 420.) Compare the pleading in the case of *Norfolk etc. Ry. Co. v. Ormsby*, 27 Gratt. (Va.) 455, as set forth on pages 47, 48, volume 13, Encyclopedia of Forms. See, also, the full note to *King v.*

Oregon S. L. Co., 6 Idaho, 306, 55 Pac. 665, 59 L. R. A. 238. Even though we had not shown such direct connection, the rule announced in *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 129 Am. St. Rep. 659, 100 Pac. 971, 16 Ann. Cas. 1189, would still be applicable. Liability for negligence does not depend upon the question whether the result of the alleged negligent act might reasonably have been foreseen; it is sufficient if the result of the act is the natural, though not the necessary or inevitable, thing to be expected. (*Haase v. Morton*, 138 Iowa, 205, 115 N. W. 921, 16 Ann. Cas. 350; and note.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

A statement of the facts of this case will be found in the opinion upon the former appeal. (*Flaherty v. Butte Electric Ry. Co.*, 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 416.) Upon the return of the cause to the district court, plaintiff amended his complaint, and the issues being joined, a trial was had, which resulted in a verdict and judgment in his favor for \$25,000. Defendants have appealed from the judgment and from an order denying them a new trial.

1. The complaint as originally drawn charged negligence in the operation of the car which resulted in the injury, particularly in that Le Sage, the motorman at the time, failed to turn off the electric current, apply the brakes, and stop the car before striking the child. Upon the former appeal we held that the evidence failed to prove the specific act of negligence thus pleaded. The amendment made to the complaint consists in substituting for the allegation of the specific act of negligence in failing to apply the brakes, etc., an allegation that Le Sage failed to keep any vigilant or proper lookout, whereby he might have seen the child and avoided the injury. It is now insisted that the so-called amendment was in fact the substitution of a different cause of action.

There cannot be any question as to the general rule of law applicable in such cases. In *Leggat v. Palmer*, 39 Mont. 302,

102 Pac. 327, this court said: "Under the statute, to allow amendments is the rule; to deny them is the exception. The rule observed by this court has always been to allow them with [1] great liberality, where they do not change the nature of the action, or mislead the adversary to his prejudice; its application going even to the extent of permitting them after verdict and judgment." The only difficulty arises in applying the rule to the facts of the particular case. "To constitute a cause of action for a tort, then, the plaintiff's right must have been infringed by the wrongful act of the defendant, with the result that plaintiff suffered damages." (*Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960.) It is alleged in the original and also in the amended complaints that the negligence of the defendants in operating the car caused the injury. May the plaintiff, then, substitute as the charging part of his complaint one specific act of negligence for another, without introducing a different cause of action?

In *Kerr v. Grand Forks*, 15 N. D. 294, 107 N. W. 197, the original complaint charged that the injury resulted from negligence of the city in permitting a sidewalk to be constructed in a dangerous manner. The amendment charged that the negligence consisted in permitting the sidewalk to remain in a dangerous condition after the city had notice. It was held that this amendment was properly allowed.

In *Peery v. Quincy etc. R. Co.*, 122 Mo. App. 177, 99 S. W. 14, the original complaint charged that the negligence consisted in failing to keep a fence in repair. The amendment charged negligence in maintaining a defective gate. The allowance of this amendment was held proper.

In *Chapman v. Nobleboro*, 76 Me. 427, the pleading is not set forth, but in disposing of the objection to the amendment the court said: "The first of the amendments is, not a change in, but an addition to, the description of the alleged defect in the way, and the second relates to the manner in which the accident happened, leaving the accident itself and the result of it the same. There is therefore no change in the cause of action, either

in the alleged defect or the result of it, and the allowance of the amendments was within the discretion of the presiding justice."

In *Davis v. Hill*, 41 N. H. 329, the original declaration charged negligence in permitting a roadway to be uneven and encumbered with snow and ice, by reason whereof the injury resulted. The amendment charged negligence in failing to maintain a railing or barrier along the road, by reason of which the injury resulted. It was held that this amendment was properly allowed.

In *Montgomery Traction Co. v. Fitzpatrick*, 149 Ala. 511, 43 South. 136, 9 L. R. A., n. s., 851, the original complaint charged that plaintiff was wrongfully ejected from a street-car on the Court street line by the conductor of the car. The amendment charged that the conductor on the Electric Park line negligently tore and mutilated plaintiff's transfer ticket, by reason whereof he was ejected by the conductor of the Court street line. It was held that this amendment was proper.

In *Salmon v. City Electric Ry. Co.*, 124 Ga. 1056, 53 S. E. 575, the original complaint charged negligence on the part of the railway company in placing certain poles too near the track. The amendment offered charged negligence on the part of the conductor in failing to warn the plaintiff of the proximity of the poles to the track. It was held error to refuse the amendment.

In *Smith v. Bogenschultz*, 14 Ky. Law Rep. 305, 19 S. W. 667, 20 S. W. 390, the original complaint charged that plaintiff's injury was caused by the jostling of a ladle containing molten iron, occasioned by the narrowness of the passageway through which the ladle had to be carried. The amendment charged that the injury resulted from the negligence of defendant in furnishing a defective ladle. It was held error to refuse the amendment.

In *City of Evanston v. Richards*, 224 Ill. 444, 79 N. E. 673, the original declaration pleaded negligence on the part of the city in permitting certain boards in a sidewalk to become loose, whereby plaintiff tripped and fell. The amendment charged

negligence in permitting the sidewalk to remain in an unsafe condition, by reason whereof plaintiff stepped upon and broke through a defective board, thereby sustaining the injury. It was held proper to allow the amendment, and in the course of the opinion the court said: "In the case at bar the act or wrong charged was the disregard by the appellant of its duty to keep its sidewalk in safe repair, and in permitting it to be and remain in bad and unsafe repair and condition. In the original declaration the pleader stated the manner in which the condition complained of resulted in the injury to appellee. Upon the trial the proof tended to show the condition complained of was as alleged in the declaration, but that the manner of appellee's injury was not as alleged, but in the manner stated in the amendment. The act or wrong of appellant which resulted in the injury was the same in the original declaration as charged by the amended declaration; the mode or manner in which it resulted in the injury was stated differently."

The theory of all these cases is that, so long as the plaintiff [2] adheres to the injury originally declared upon, he may amend his pleading by alleging that the injury was caused in a different manner, without infringing the general rule against introducing a different cause of action. (1 Ency. of Pl. & Pr. 564.)

In *More v. Burger*, 15 N. D. 345, 107 N. W. 200, it is well said: "The test generally adopted to determine whether an amendment is permissible is whether a recovery upon the cause of action set up by the amendment would be a bar to a suit upon the other."

The same injury is described in the original and in the amended complaint in this instance, and relief for that injury is sought in each pleading. The measure of damages is the same in each instance, and that a judgment recovered upon either pleading would bar recovery upon the other admits of no doubt. We approve the action of the district court in allowing the amendment, as well within the rule heretofore announced by this court.

2. It is insisted that the complaint does not state a cause of action against the railway company. It must be admitted at

once that the liability of the railway company for the negligent act of Le Sage is grounded in the rule *respondeat superior*, and in order for that rule to apply the person sought to be charged must stand in the relation of superior to the person doing the wrongful act. (1 Thompson's Commentaries on the Law of Negligence, sec. 578; *King v. New York Central & H. R. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755.) It is urged that the complaint in this instance does not allege that Le Sage was a servant of the railway company; and while the allegation in express terms cannot be found in the amended complaint, and its [3] absence is scarcely excusable, still, if there are sufficient facts alleged from which such relationship may fairly be inferred, we will not feel justified in reversing the judgment.

The complaint alleges that at the time of the injury the defendant railway company was the owner of, and operating, street-cars on West Park street in Butte, for the purpose of transporting passengers from point to point in the city; that at such time and place Le Sage was in charge of one of said cars, in the capacity of conductor; that at such time and place the car so in charge of Le Sage was proceeding along West Park street between Columbia and Crystal streets; "that the defendant Le Sage was driving said car as motorman, and not acting in his usual and regular capacity as conductor on said car, doing so with the knowledge and consent of the defendant corporation." In each of the separate answers filed by the defendants, these specific allegations are admitted. In attempting to charge the relationship of master and servant, it must be conceded that it is not necessary to plead any facts other than those necessary to be proven, in order to establish such relationship when in issue.

In 1 Shearman & Redfield on the Law of Negligence, section 158, it is said: "When the plaintiff has suffered injury from the negligent management of a vehicle, such as a boat, car, or carriage, it is sufficient *prima facie* evidence that the negligence was imputable to the defendant, to show that he was the owner

of the thing, without proving affirmatively that the person in charge was the defendant's servant."

In 1 Thompson's Commentaries on the Law of Negligence, section 580, the same rule is announced as follows: "So it is not necessary to prove an express contract of employment in order to establish the relation of master and servant, but the relation may be implied from circumstances, as where the person committing the wrong is at the time in the actual conduct of the business of another with his seeming consent, in which case that other will be responsible for the wrong done by the former within the scope of the apparent employment, on the ground that he has induced the belief that such person is his servant, and has led another to act upon that belief to his injury." To the same effect are *McCoun v. New York Central & H. R. R. Co.*, 66 Barb. (N. Y.) 338; *Growcock v. Hall*, 82 Ind. 202; *Norris v. Kohler*, 41 N. Y. 42. Even though this complaint may not be a model pleading, we think it fairly appears from it that Le Sage was the servant of the railway company at the time of the injury, and that the rule of *respondeat superior* is properly invoked.

3. It is insisted, also, that the complaint fails to state facts showing a breach of duty on the part of defendants, and also that the negligence alleged was a proximate cause of the injury. [4] The complaint alleges, and the answers admit, that the car was being operated in a public and much-used street in the city of Butte. From this fact it follows that the defendants were under the obligation or duty to keep a vigilant lookout for people who might be rightfully using the street. The general rule, with the authorities supporting it, is found stated in 36 Cyc. 1520, as follows: "It is the duty of the driver or motorman of a street-car to exercise reasonable and ordinary care to discover persons using the street on or near the track, and liable to be injured by his car, in time to avoid injuring them, and if he fails to discover a person on or near the track, when by the exercise of ordinary care he could have done so in time to stop the car or otherwise avoid the injury, it is negligence for which the company is liable."

The complaint alleges that Le Sage, the motorman, at the time failed to keep a vigilant or proper lookout, whereby he might have seen the child before it came into a place of danger. We think the complaint contains a sufficient statement of the duty and breach.

The only specific act of negligence charged is in failing to keep a proper lookout; and the complaint then proceeds: "That [5] by reason of the negligence of said defendants he [plaintiff] was injured." This is a sufficient showing of the causal connection between the alleged act of negligence and the injury. (*Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 129 Am. St. Rep. 659, 100 Pac. 971; see, also, same case in 16 Ann. Cas. 1189, and note; *Reino v. Montana Min. Land Dev. Co.*, 38 Mont. 291, 99 Pac. 853.)

4. Without reviewing the evidence at length, we think it sufficient to go to the jury upon the question of Le Sage's negligence in failing to keep a proper lookout, and that a verdict was justified if the plaintiff's evidence was treated as true, as it must have been. We cannot agree with counsel for appellants that the evidence is subject to but one construction, *viz.*, that the child appeared on the track under such circumstances as to make its injury unavoidable. There is a sharp conflict [6] in the evidence as to whether a wagon passed the car immediately before the injury happened or whether there was a dust storm which might have interfered with Le Sage in attempting to keep a lookout; and under these circumstances it was proper to submit to the jury the question whether or not the injury was or was not unavoidable. (*Harrington v. Butte etc. Ry. Co.*, 39 Mont. 299, 102 Pac. 330.)

5. It is insisted that the verdict returned in this instance is grossly excessive. It has been well said: "To ascertain what is a fair and just compensation for a personal injury is a judicial problem of difficult, if not impossible, solution." In the note to *Cleveland etc. R. Co. v. Hadley* (170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A., n. s., 527), as reported in 16 Ann. Cas. 1, there is a most complete collation of cases involving personal injuries. The cases are carefully analyzed and classified

according to the character of injury and the action taken by the appellate court. A review of those cases involving an injury of the character suffered in this instance discloses that, except in New York and Texas, in every instance where the verdict exceeded \$15,000 it has been disapproved, and that in nearly every instance the amount has been reduced to \$12,500, or less. While the views of these courts are not binding upon us, they at least indicate in a general way the prevailing opinion as to the reasonableness of verdicts in this class of cases. Considering all the facts and circumstances as disclosed by this record, [7] we think a recovery of \$12,500 will compensate for the injury sustained, assuming, as we must, that it is possible to measure in money the extent of an injury which deprives a person of one member of his body.

It is ordered that this cause be remanded to the district court, with directions to grant a new trial, unless within thirty days after the *remittitur* is filed, and plaintiff has notice thereof, he shall file with the clerk of the district court his consent in writing that the amount of the judgment be reduced to \$12,500 as of the date of the filing of such writing. If such written consent be filed within the time designated, then the judgment shall be modified accordingly, and as modified shall stand affirmed, and under those circumstances the order refusing a new trial will also be affirmed, with costs to respondent.

New trial granted nisi.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing denied April 17, 1911.

STATE EX REL. HOLLIDAY, RELATOR, v. O'LEARY, CITY CLERK, RESPONDENT.

(No. 2,993.)

(Submitted March 23, 1911. Decided March 29, 1911.)

[115 Pac. 204.]

Elections—Nomination to Judicial Office—Constitution—Statutes—Uniform Operation—Defective Title—Right to Question Validity.

Statutes—Validity—How Determined.

1. The validity of a statute is not to be determined by what has been, but by what may be, done under it.

Elections—Nominations to Judicial Office—Constitution—Statutes—Invalidity.

2. *Held*, under the rule that a statute which denies to the elector of the state, or any part of it, the right to nominate candidates for public office is void as violative of the Bill of Rights (Const., Art. III, secs. 5, 26), that Chapter 113, Laws of 1909, providing for nonpartisan nomination to judicial office, by petition, is invalid because incapable of being made to operate uniformly throughout the state, in that it fails to provide any means by which a candidate for judicial office may be nominated in a newly created municipality, or for a newly created judicial office, or for judicial office in a district the boundaries of which have been changed since the last election or may be changed hereafter.

Same—Statutes—Defective Title.

3. Chapter 113, Laws of 1909, held, unconstitutional for the further reason that its title does not clearly express the purpose of the statute, as required by section 23, Article IV of the Constitution.

Statutes—Validity—Who may Question.

4. One to whom a statute denies a right which, in its absence, he would have, may raise the question of the constitutionality of the Act.

MR. JUSTICE SMITH dissenting.

MANDAMUS. Original application by the state, on the relation of W. H. Holliday, against John O'Leary, as clerk of the city of Butte, Silver Bow county, to compel the filing of relator's certificate of nomination as a candidate for the office of police judge of the city. Writ granted.

Mr. W. B. Rodgers, and Messrs. Davies & Lyon, submitted a brief in behalf of Relator. Mr. Rodgers argued the cause orally.

Chapter 113, Laws of 1909, is obnoxious to section 23, Article V, of the state Constitution. (See *Rouse v. Thompson*, 228 Ill.

522, 81 N. E. 1109; *Yegen v. Board of Commissioners*, 34 Mont. 79, 85 Pac. 740; Lewis' Sutherland on Statutory Construction, 2d ed., secs. 123, 125; *State v. Brown*, 29 Mont. 207, 74 Pac. 366; *Blades v. Board of Water Commissioners*, 122 Mich. 366, 81 N. W. 271; *Brooks v. Hydorn*, 76 Mich. 273, 42 N. W. 1122; *Sneath v. Mager*, 64 N. J. L. 94, 44 Atl. 983; *New York & G. L. Ry. Co. v. Montclair Township*, 47 N. J. Eq. 591, 21 Atl. 493; *State v. Sholl*, 58 Kan. 507, 49 Pac. 668.)

Said Act is also unconstitutional because it violates section 25 of the same Article. (*People v. Board of Election Commissioners*, 221 Ill. 9, 77 N. E. 323, 5 Ann. Cas. 562.)

The Act is also void for the following reasons: (a) It is inoperative and the intention of the legislature to make all judicial officers throughout the state nonpartisan, and require them to be nominated in the manner therein provided, cannot be carried out; (b) On account of the inability to make nominations, as provided therein, under certain existing conditions, the intention of the legislature that the law should be uniform in its operation is completely thwarted and destroyed, and cities of the same class and certain judicial districts cannot make nominations as provided therein and, indeed, cannot make any nominations whatsoever for the judicial office of police judge, or the office of district judge; (c) These conditions necessarily, when they arise, prohibit the qualified electors residing within the particular municipalities and cities, and the particular judicial districts, from making any nomination at all of candidates for these elective offices by participating therein, and by reason thereof said Act violates that portion of section 5, of Article III, of the state Constitution, which provides that all elections shall be free and open; (d) They make the law local and special, whereby it contravenes the Constitution. (1 Lewis' Sutherland on Statutory Construction, 2d ed., sec. 86; *Hilburn v. St. Paul Ry. Co.*, 23 Mont. 229, 58 Pac. 551, 811; *Chaffee's Appeal*, 56 Mich. 244, 22 N. W. 871.) Upon the proposition that any law which deprives a portion of the electorate in taking part in the nomination of the candidates for public office is in

contravention of that provision of the Constitution heretofore mentioned in relation to free and open elections, the authorities are abundant and uniform. (See *State ex rel. Ragan v. Junkin*, 85 Neb. 1, 122 N. W. 473, 23 L. R. A., n. s., 839; *State v. Drexel*, 74 Neb. 776, 105 N. W. 174; *People v. Election Commissioners*, 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562; *Rouse v. Thompson, supra*; *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196; *Johnson v. Grand Forks Co.*, 16 N. D. 363, 125 Am. St. Rep. 662, 113 N. W. 1071; *Britton v. Board etc.*, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115.)

This law being clearly unconstitutional and inoperative, in taking away the right to make nominations in the cases mentioned above, it cannot be upheld as to localities where such objections might not exist, and said conditions might not obtain. (1 Lewis' Sutherland on Statutory Construction, 2d ed., sec. 307; *People v. Election Commrs., supra*.) Where an Act, indivisible in its nature, is void in part, it is void as to all its provisions. (*Doe ex dem. Davis v. Minge*, 56 Ala. 121; *Ex parte Jones*, 49 Ark. 110, 4 S. W. 639; *People v. Cooper*, 83 Ill. 585; *Hinze v. People*, 92 Ill. 409; *Cornell v. People*, 107 Ill. 372; *State v. Clinton*, 28 La. Ann. 201; *State v. Perry County Commissioners*, 5 Ohio St. 497; *Burkholtz v. State*, 84 Tenn. 71; *Ex parte Towles*, 48 Tex. 413.)

We also insist that the provision of this law whereby candidates for judicial offices may not be nominated by political parties is violative of section 5 of Article III of the Constitution of the state of Montana, and kindred provisions. This reads as follows: "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

It is an elementary and fundamental principle that the language of the Constitution must be given the meaning that it was understood to have at the time the Constitution was adopted; and that the conditions then obtaining must be given full force in its construction. It therefore follows that the word "elections" as used in this section, and the words "right of suffrage"

as used in this section, must be given the meaning and are used therein in the sense, and carry with them the same privileges that were then enjoyed; and it was the intention of this section of the Constitution to forever prohibit the legislature from in any way infringing upon the right of suffrage as then enjoyed by the people of the state of Montana, or as conferred upon them by the provisions providing for the election of judicial and executive officers which had theretofore been filled not by election, but by appointment, on account of the state being then a territory. It is well settled by abundant authority that the phrases "elections," "suffrage" or "right of suffrage," as used in this section of the Constitution, mean more than the simple right to go to the polls and cast a ballot for some candidate for office at the regular or general election, and that they include the right to participate freely in all the preliminary steps to the nomination, and in the nomination of candidates, as well as to participate in their election after they have been nominated; and that any infringement of the electors' right to so participate, or any unjustifiable restriction upon that right, is an infringement of this provision of our Constitution. (See authorities under paragraph 3, *supra*.) The right of suffrage and nomination of candidates for office also includes the right to use the influence of the voter and his vote to defeat those who aspire for such positions. This right is absolutely denied to every elector, and therefore elections, so far as they relate to the nomination of candidates, are not free and open.

Mr. Edwin M. Lamb, appearing in behalf of Respondent, argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On March 2 of this year, and within the time allowed by law for filing certificates of nominations of candidates for city offices, there was presented to the city clerk of Butte, for filing, a certificate which on its face discloses that relator had thereto-

fore been regularly nominated by the Republican party of Butte as its candidate for the office of police judge of said city, to be voted for at the forthcoming city election. The city clerk refused to file the certificate, upon the sole ground that Chapter 113, Laws of 1909, forbade him doing so. Application was thereupon made to this court for a writ of mandate to compel the clerk to file the certificate. An alternative writ was issued, and upon the return the matter was argued and submitted for determination. This proceeding raises the question of the constitutionality of Chapter 113 above, popularly known as the Nonpartisan Judiciary Act.

1. However laudable the ambition of our legislators to divorce the judiciary from partisan politics, they failed to accomplish their purpose by means of Chapter 113, above, by reason of the fact that its provisions are not sufficient to make it operative throughout the state.

(a) It does not provide any means by which a candidate can be nominated for judicial office in a newly created municipality. It is a matter of general knowledge that at the time this Act was passed there were cities and towns in the state that had sprung up since the last election for city officers; that these municipalities have increased in population rapidly, are now duly incorporated and entitled in every instance to elect officers, including police judge. This Act prohibits the nomination of a candidate for judicial office in any manner, except by petition signed by electors of the municipality in number not less than five per cent of the vote cast for the successful candidate for the same office at the last preceding election. In every instance of a newly created municipality, there has not been a preceding election, or any successful candidate for the same office, and therefore this Act prohibits the electors in such municipality from participating in the nomination of any candidate for that office. The same thing is true of a newly created judicial district. A candidate for nomination for district judge in such district will be confronted by conditions with which it is impossible to comply. He cannot be nominated, except by petition,

and he cannot be nominated by petition, because he cannot determine, and neither can the secretary of state, the number of signatures necessary to secure his nomination, since there never was a preceding election for the same office in the same district.

(b) The Act does not make any provision for the nomination of a candidate for a newly created judicial office. It is a matter of legislative history that, since the last general election for district judges, four new district judgeships have been created. Neither any one of the appointees to these positions, nor anyone else, can be nominated a candidate to succeed to one of these offices under the provisions of this Act; for at the time the election in November, 1908, was held none of these offices existed, and there could not have been a successful candidate for any of them.

(c) The Act does not make any provision for the nomination of a candidate for judicial office in any district the boundaries of which have been changed since the last election, or may hereafter be changed. Since the last election of district judges, the boundaries of the eighth, tenth, eleventh, and thirteenth judicial districts have been altered. A few illustrations will serve to emphasize this omission in the Act. At the last election for district judge, the eighth judicial district was composed of Cascade county only. That district now comprises Cascade and Teton counties. There was not any successful candidate for district judge in the territory which now comprises this district. A petition signed by five per cent of the vote received by the successful candidate in 1908 would ignore altogether the vote of Teton county—a county which is now part of the district. In 1908 the eleventh district comprised Flathead and Teton counties. After that election and before Chapter 113 was passed, Teton county was detached from that district (Laws 1909, Chapter 26). Shall a candidate for the nomination for district judge be required to have his petition signed by electors in number not less than five per cent of the vote cast for the successful candidate at the last election in Flathead county only, or shall he be re-

quired to secure signatures in number not less than five per cent of the vote received by the successful candidate in 1908 in both Flathead and Teton counties? If this last alternative be chosen, then the candidate is required to take into consideration the vote cast in a county which is not now a part of the district in which he aspires to office. The same conditions prevail in the tenth and thirteenth districts. But great emphasis may be given to this lapse in the Act by an assumed state of facts:

By an Act of the Twelfth Legislative Assembly, approved February 11, 1911, Musselshell county was created out of a portion of Fergus county, a portion of Meagher county, and a portion of Yellowstone county. The portions taken from Fergus and Meagher counties were theretofore portions of the tenth judicial district, while the portion taken from Yellowstone county was theretofore a portion of the thirteenth judicial district. Assume that when Musselshell county was created it had been constituted the fourteenth judicial district; and assume a further fact, which may or may not be true, that the present boundary lines of Musselshell county do not follow any of the election precinct boundary lines, but that the new county now contains portions only of election precincts from each of the parent counties. A candidate for nomination for district judge in the supposed district could not possibly comply with the requirements of Chapter 113, because there was not any fourteenth district at the last election, and not any candidate for district judge therein; but more particularly because there is not any means by which to determine the vote cast in the territory which now comprises Musselshell county, under the assumed state of facts. An entire election precinct is the smallest territorial subdivision of the state for which any record of the vote is or can be had, and it is impossible for the officer charged with the duty of filing nominating certificates to determine the vote cast for any candidate in a portion of an election precinct. It will not do to say that the number of signatures necessary to secure a nonpartisan nomination under the circumstances enumerated can be estimated or approximated. The operation of a

statute cannot be made to depend upon mere guesswork. The theory of this Act is that the officer with whom the nominating certificate is to be filed, by reference to the official returns of the last election as they appear in his own office, shall determine whether the certificate tendered for filing is signed by the required number of electors. Neither is it any answer to say that the conditions assumed may not arise. They may arise; [1] and the validity of a statute is not determined by what has been done under it, but by what may be done under it. This is a well-recognized rule of constitutional law. (1 Lewis' Sutherland on Statutory Construction, sec. 107; *Minneapolis Brewing Co. v. McGillivray* (C. C.), 104 Fed. 258.)

The illustrations given only serve to show that Chapter 113 is so far deficient in its provisions that it cannot be made to operate uniformly throughout the state; and, if it cannot be [2] made to operate in any portion of the state, then, as to such portion, the electors are denied the right to participate in the nomination for judicial candidates, and any statute which denies to the elector of the state, or any portion of it, the right to nominate candidates for public office, is in violation of sections 5 and 26 of our Bill of Rights, and void. (*State ex rel. Adair v. Drexel*, 74 Neb. 776, 105 N. W. 174; *State ex rel. Ragan v. Junkin*, 85 Neb. 1, 122 N. W. 473, 23 L. R. A., n. s., 839; *People ex rel. Breckon v. Election Commissioners*, 221 Ill. 9, 77 N. E. 321; *Rouse v. Thompson*, 228 Ill. 522, 81 N. E. 1115.)

It is not an answer to say that the elector may vote for the person of his choice by writing the name on the ballot, even though such person cannot be nominated for the office. It is in the infringement of the right of the electors to nominate candidates that this measure offends against the letter and spirit of our Constitution. The general rule of law applicable to an Act of this character is aptly stated by this court in *Hilburn v. St. Paul, M. M. Ry. Co.*, 23 Mont. 229, 58 Pac. 551, as follows: "So, if an Act of the legislature is so vague and uncertain in its terms as to convey no meaning, or if the means of carrying

out its provisions are not adequate or effective, or if it is so conflicting and inconsistent in its provisions that it cannot be executed, it is incumbent upon the courts to declare it void and inoperative." The application of that rule is conclusive against the validity of this Act.

2. The title does not clearly express the purpose of the Act. The title of Chapter 113 is, "An Act to provide for nonpartisan nominations for judicial offices." Section 23, Article 5, of the Constitution, in so far as applicable here, provides: "No bill * * * shall be passed containing more than one subject, which shall be clearly expressed in its title." The title of this Act indicates that the purpose of the legislation is to provide for nonpartisan nominations for judicial offices; but that such result was not the real purpose of the Act is apparent, for nonpartisan nominations were already provided for in section 1313, Political Code of 1895 (Rev. Codes, sec. 524), and the method there prescribed was not changed in any particular. It is hardly to be presumed that our legislature would solemnly enact a statute upon any subject which was already covered by another statute in precisely the same language; and yet, if the title of this Act is fairly indicative of its purpose, that is just what our legislature did. The body of this Act, however, discloses that the purpose of the legislation was not to provide for nonpartisan nominations, for which provision was already made, but to prohibit judicial nominations by partisan political organizations.

The reasons which prompted the enactment of the constitutional provision now under consideration are stated by Mr. Justice Hunt, for the court, in *State v. Anaconda Copper Min. Co.*, 23 Mont. 498, 59 Pac. 854, as follows: "The purposes of the clause of the constitutional mandate that the subject of a bill shall be clearly expressed in its title have been considered and defined by this court in *State v. Mitchell*, 17 Mont. 67, 42 Pac. 100; *Jobb v. County of Meagher*, 20 Mont. 424, 51 Pac. 1034, and the authorities cited in these cases. Briefly summarized they are: To restrict the legislature to the enactment of laws the objects of

which legislators and the public as well may be advised of, to the end that any who are interested, whether as representatives or those represented, may be intelligently watchful of the course of the pending bill. The limitation is likewise designed to prevent legislators and the people from being misled by false or deceptive titles, and to guard against fraud in legislation by way of incorporating into a law provisions concerning which neither legislators nor the public have had any intimation through the title read or published." However refined the distinction we have made above may appear, it is not without merit. It is a part of our constitutional history that during the early years of our existence as a nation, few, if any, of our state Constitutions contained a provision similar to the one referred to herein. It is doubtful if any state Constitution now omits it. It was early discovered that ambitious or designing legislators, prompted by selfish motives or motives of less merit, procured the enactments of measures by reason of their high-sounding or popular titles, when in fact the title merely cloaked a purpose contrary to that expressed; and it was to prevent the members of the legislature and the people generally from being thus imposed upon that these provisions have been adopted. An interesting historical sketch of the conditions which led to the adoption of a like provision in the Constitution of New York will be found in *Matter of New York*, 57 App. Div. 166, 68 N.Y. Supp. 196.

The framers of our Constitution wisely held that it is not a hardship to require that every title shall clearly express the single purpose of the bill; but, even if it should prove a hardship, that it is better that an Act be held inoperative, than that it be passed under a title which might deceive the unwary. From the fact that for years we had provisions for partisan and nonpartisan nominations, and that these provisions worked harmoniously, it may be that members of the Eleventh Legislative Assembly voted for this measure, who would not have voted for a measure entitled "An Act to prohibit partisan nominations for judicial offices." But whether any member was

in fact deceived is beside the question. The title of this Act [3] does not clearly express its purpose, as required by the Constitution.

Had the title been a general one, a different question would be presented, but the title of this Act limits the Act itself to provisions for nonpartisan nominations only. Prior to the passage of this measure, partisan nominations of candidates for judicial offices were recognized by sections 521-523, Revised Codes. There is not any intimation in the title of this Act that its purpose was to repeal those provisions or prevent partisan nominations of judicial candidates in the future. If it be said that the measure does in fact provide for nonpartisan nominations by continuing in force the provisions of section 1313, then it must be conceded that, in so far as its purpose is to prohibit partisan nominations, that purpose is not expressed in the title at all, and, if not expressed in the title, it is excluded from the body of the Act, and the measure is void to the extent, at least, that it purports to prohibit such partisan nominations.

To say that the title, "An Act to provide for nonpartisan nominations for judicial offices," clearly expresses a purpose to prohibit partisan nominations is equivalent to saying that every statute which provides one method for doing a particular thing, perfecly prohibits the same thing being done in any other manner—a conclusion which does not find support in any authority. Many statutes provide alternative or cumulative remedies, or alternative or cumulative methods, for doing a particular act or thing. If the purpose of Chapter 113 is to prohibit partisan nominations, the title fails to indicate such purpose, but rather suggests an altogether different object or purpose.

3. Is this relator in a position to raise the question of the constitutionality of this statute? It is the general rule that one whose rights are not affected by a statute, will not be heard to question its validity. (*Spratt v. Helena Power Transmission Co.*, 37 Mont. 60, 94 Pac. 631; 1 Lewis' Sutherland on Statutory Construction, sec. 107.) The converse of this is equally true: One whose rights are affected by the operation of a statute may

question its validity. If Chapter 113 is not in effect, then the relator has the right to have his certificate filed as presented, under sections 521-523, Revised Codes. If Chapter 113 is in full force and effect, then he does not have such right. The effect of this statute, then, if in force, is to deny to the relator a right which [4] otherwise he would have, and this is sufficient to entitle him to raise the question of its validity. (*State v. Brown*, 38 Ohio St. 344; *Brooks v. State*, 162 Ind. 568, 70 N. E. 980.)

Other objections are urged against the validity of this measure, but it has not been deemed necessary to consider them at this time. A peremptory writ has issued, and a further order is not necessary.

MR. CHIEF JUSTICE BRANTLY: I concur. I am of the opinion that the Act is void for the additional reason that it falls within the prohibition found in section 25, Article V, of the Constitution, which declares: "No law shall be revised or amended, or the provisions thereof extended by reference to its title only, but so much thereof as is revised, amended or extended shall be re-enacted and published at length." Upon reading the title, one would expect to find in the body of the Act specific directions as to the method to be pursued in nominating candidates for judicial offices. In fact, we find nothing of the kind. Instead we find in the first and second sections provisions which have no other effect than to amend section 1313 of the Political Code of 1895, now section 524 of the Revised Codes, by making it exclusive, in so far as it applies to the candidates mentioned. In effect it adds, by reference to that section, by number only, a proviso which may be expressed as follows: "Provided that candidates for judicial offices shall be nominated as herein prescribed, and not otherwise." Since the infirmities discussed by Mr. Justice Holloway sufficiently demonstrate the invalidity of the Act, it is not necessary to discuss this feature of it.

MR. JUSTICE SMITH: I dissent. My judgment is (a) that the title of the Act is sufficient, and (b) that the so-called "Non-partisan Judiciary Act" can be substantially complied with, if

a *bona fide* attempt is made to do so. The matter of placing the names of candidates upon the official ballot is simply a preliminary detail; if the method provided is uniform as to all aspirants for public office by independent nomination, a substantial compliance with the procedure, indicated by the legislature is all that is necessary. The really vital questions can only arise after nominations have been made. These relate to the election which follows. Even assuming that the future may disclose some difficulty in complying literally with the terms of the Act, I do not think this relator, who has encountered no such obstacle in the city of Butte, is in a situation to raise the question at this time.

STATE EX REL. CITY OF HELENA, RELATOR, v. HELENA
WATERWORKS CO. ET AL., RESPONDENTS.

(No. 2,996.)

(Submitted April 1, 1911. Decided April 12, 1911.)

[115 Pac. 200.]

Injunction—Supreme Court—Original Jurisdiction—Constitution—Municipal Corporations—Nature of Powers.

Supreme Court—Original Jurisdiction—Constitution.

1. The supreme court may not take original jurisdiction in any case unless authority to do so is found in the Constitution.

Same—Appellate Jurisdiction—Constitution.

2. The appellate jurisdiction granted the supreme court in section 2, Article VIII of the Constitution, is properly invoked by appeal only (or perhaps by writ of error), and is confined in its exercise to a review of cases which have been decided by the district courts.

Same—Supervisory Control Over Inferior Courts—Constitution.

3. The supervisory power of the supreme court granted by section 2, Article VIII of the Constitution, was designed to control summarily the course of litigation in the inferior courts and prevent injustice being done through a mistake of law or a willful disregard of it, where there is no appeal from the erroneous action, or where, there being an appeal, the relief obtained thereby would be inadequate.

Same—Injunction—Power to Issue, When.

4. To authorize the supreme court to issue the writ of injunction in the exercise of its original equity jurisdiction (as distinguished from its power to grant the writ to preserve the subject of the

action pending appeal) the rights of the public, i. e., those of the state or some subdivision thereof, must be involved.

Municipal Corporations—Nature of Powers.

5. A municipality possesses two classes of powers, (1) those which are governmental, legislative or public, and (2) those which are proprietary or private; in the exercise of the second class of powers it does not act as an agency of the government, but as a corporate individual representing the private advantage of the community for the government of which it was created.

Same—Injunction—Supreme Court—Original Jurisdiction.

6. In seeking to provide a water supply and construct a system for itself and its inhabitants, a city acted in its private corporate capacity, as distinguished from an exercise of its public powers; hence, under the rule declared in paragraph 5, *supra*, it was in no position to invoke the original jurisdiction of the supreme court, by way of injunction, in a controversy arising in connection with that enterprise.

MR. JUSTICE SMITH dissenting.

Original application by the state, on the relation of the city of Helena, against the Helena Waterworks Company and others, for an injunction. Dismissed.

Mr. Edward Horsky, City Attorney, and *Mr. C. W. Wiley*, submitted a brief in behalf of Relator. *Mr. Horsky* argued the cause orally.

Messrs. Gunn & Hall, *Mr. J. A. Walsh*, and *Mr. Walter Hartman*, submitted a brief in behalf of Respondents. Oral argument by *Mr. M. S. Gunn*, *Mr. Walsh*, and *Mr. Hartman*.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for an injunction. The purpose sought by this application is to have this court, in the exercise of original jurisdiction compel the several defendants to dismiss certain actions brought by them and now pending against the relator, the city of Helena, and to refrain from instituting others of a similar character hereafter. The actions described in the petition are: One instituted by the defendant Charles E. Bockus, as receiver of the Helena Waterworks Company, in the circuit court of the United States for the district of Montana, to enjoin the issuance and sale of bonds by the city to procure funds for the purpose of installing its own water supply system; a second, brought

by the defendants Lokowich, Stabler, the two Baums, Fisher, Davies, Dallas, Thompson, Beatty, and Filson, in the district court of the Ninth judicial district of Montana, in and for Broadwater county, to restrain the city from diverting from Beaver creek, in said county, any of the water flowing therein and conveying it to the city, the same being outside of the watershed drained by the stream; and a third, brought in the same court for the same purpose as the foregoing, by the defendant Custer Mines Consolidated Company. The defendants Gunn, Hall, Hartman, and Walsh are the attorneys, each representing some one or more of the plaintiffs in these several actions. It is alleged, in substance, that they, conspiring together with the said Bockus and others, have brought and procured to be brought all of the said actions, well knowing that the alleged rights involved therein have heretofore been fully adjudicated by the courts of Montana, and that the said actions are wholly without merit, for the sole purpose of embarrassing the city in making a sale of its bonds, and to obstruct it in the prosecution of its purpose to install its water system to supply its inhabitants with water. As a reason why this court should assume original jurisdiction, it is alleged that, since an appeal would lie from the decision of any action or proceeding brought in a district court to obtain relief, such decision would not be effective because of the delay necessarily incident to the appeal; it being necessary and desirable that the sale of bonds now advertised should be consummated.

The defendants, in response to an order to show cause, made upon the presentation of the application, filed their answers, reserving, however, the right to question the power of this court to grant the relief prayed for. The cause was then submitted for final judgment, upon the pleadings, a transcript of the testimony of several witnesses in the form of depositions taken in the action brought by Lokowich and his codefendants, and other documentary evidence. The controlling question presented for decision arises upon the objection of the defendants to the jurisdiction of this court. Even without objection, what-

ever may be the merits of a controversy from a judicial point [1] of view, this court may not assume original jurisdiction in any case unless authority to do so is found in the Constitution.

This court was created by the Constitution. That instrument is the charter of its power. The assumption by it to exercise a power not expressly granted or necessarily implied would be a usurpation. On the other hand, a refusal to exercise any power granted, when properly invoked, would be a clear violation of its duty. When we turn to the Constitution to ascertain the powers conferred, it is apparent that the purpose of the convention that formulated it was to constitute a court exclusively a court of review, with all the auxiliary powers necessary to the exercise of this jurisdiction, except in so far as it expressly declared otherwise. The provisions defining and limiting its powers are found in sections 2 and 3 of Article VIII, as follows:

"Sec. 2. The supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law.

"Sec. 3. The appellate jurisdiction of the supreme court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law. Said court shall have power in its discretion to issue and to hear and determine writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, prohibition and injunction, and such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction."

The different justices are in the latter part of section 3 clothed with power to issue, hear and determine writs of *habeas corpus*, and also writs of *certiorari* to review proceedings for contempt in the district courts; but these powers are conferred upon the justices individually. Consideration of them is not pertinent here. In section 2 the grant is of "appellate jurisdiction only," "except as otherwise provided," and "a general supervisory control over all inferior courts." The appellate

[2] jurisdiction here granted is properly invoked by appeal only, or perhaps by writ of error, and is confined in its exercise to a review of cases which have been decided by the district [3] courts. The supervisory power—which is also appellate in its nature—was designed to control summarily the course of litigation in the inferior courts and prevent an injustice being done through a mistake of law or a willful disregard of it when there is no appeal from the erroneous order, or the relief obtained through the appeal would be inadequate. Its purpose is pointed out in *State ex rel. Whiteside v. District Court*, 24 Mont. 539, 63 Pac. 395. Its appropriate use is illustrated by the following cases: *State ex rel. Anaconda C. Min. Co. v. District Court*, 25 Mont. 504, 65 Pac. 1020; *State ex rel. Shores v. District Court*, 27 Mont. 349, 71 Pac. 159; *State ex rel. Sutton v. District Court*, 27 Mont. 128, 69 Pac. 988; *State ex rel. Boston & Mont. C. C. & S. Min. Co. v. District Court*, 30 Mont. 96, 75 Pac. 956; *State ex rel. Boston & Mont. C. C. & S. Min. Co. v. District Court*, 30 Mont. 206, 76 Pac. 206; *State ex rel. Clark v. District Court*, 30 Mont. 442, 76 Pac. 1005. It is not necessary to consider it further here.

By section 3 the jurisdiction granted under section 2 is extended to "all cases at law and in equity." The rule of interpretation to be applied in order to ascertain the limits of this jurisdiction is embodied in the maxim, "*Inclusio unius est exclusio alterius*"; for in the Declaration of Rights this rule of interpretation is declared as follows: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." (Article III, section 29.) In section 2, above, the word "only" is exclusive. It signifies "no other than," as applied to the objects with reference to which it is used. Hence it excludes the notion of original jurisdiction in any case, except so far as it is conferred by some other provision. The word "all," used in section 3, is inclusive, and signifies "the whole number of" with reference to "cases at law and in equity." Thus again the affirmative words in this section operate to exclude the notion of original jurisdiction over

any case which falls in the designated classes. Hence the authority to assume jurisdiction of the case in hand, if asserted at all, must be found in the grant of power, contained in section 3: to issue, hear, and determine the six original writs enumerated therein, including the writ of injunction.

It will be observed that, while the supervisory and appellate jurisdictions conferred are to be exercised under limitations and regulations prescribed by law, the writs enumerated in section 3 are put into the hands of the court to be made use of at its discretion, to effectuate their appropriate purposes. All of them, except the writ of injunction, are common-law writs, and their uses were at the time of the adoption of the Constitution well defined and understood. It is not necessary to discuss them. The purpose and functions of the writ of injunction are discussed and defined in *State ex rel. Clark v. Moran*, 24 Mont. 433, 63 Pac. 390. Inasmuch as it (a nonjurisdictional writ) is found grouped with five other jurisdictional writs, the rule "*noscitur a sociis*" was applied to determine the uses which it must serve, and the conclusion was reached in that case that it was the intention of the convention that it was not to be used as a provisional remedy in aid of an independent equity jurisdiction conferred upon this court,—because none such was conferred,—but as a new prerogative or *quasi* prerogative writ (the equity arm of the court's original jurisdiction) which, together with its associates, would fully equip the court as a court of final resort "on all judicial questions affecting the sovereignty of the state, its franchises or prerogatives or the liberties of the people." In this definition of its purpose we adopted the view of the supreme court of Wisconsin, in *Attorney General v. Railroad Companies*, 35 Wis. 425, construing an identical constitutional provision, as follows: "And, plainly recognizing the intention of the Constitution to vest in this court one jurisdiction, by several writs, to be put to several uses, for one consistent, congruous, harmonious purpose, we must look at the writ of injunction in the light of that purpose, and seek its use in the kindred uses of the other writs associated with it. '*Noscitur a sociis*' is an

old and safe rule of construction, said to have originated with as great a lawyer and judge as Lord Hale, peculiarly applicable to this consideration. Lord Bacon gives the same rule in a more detailed form, more emphatic here. '*Copulatio verborum indicat acceptationem in eodem sensu.*' Here are several writs of defined and certain application classed with one of vague import. We are to be guided, in the application of the uncertain, by its certain associates. The joinder of the doubtful writ with the defined writs operates to interpret and restrict its use, so as to be accepted in the sense of its associates; so that it and they may harmonize in their use, for the common purpose for which it is manifest that they were all given. And thus, in this use and for this purpose, the Constitution puts the writ of injunction to prerogative uses and makes it a *quasi* prerogative writ." The writ is classed as correlative to the writ of *mandamus*, to be resorted to to restrain excess, just as *mandamus* may be used in the same class of cases to compel action and supply defects. Its use was limited to cases strictly *publici juris*—those which directly affect the sovereignty of the state, its franchises or prerogatives, or the liberties of the people, and in which the interests of the state are primary and not remote. After further consideration of the subject, we are satisfied that the limitation of its use thus made is proper. Public and private rights may be involved in the same case, and, in protecting the public rights, private rights may incidentally be protected and enforced; yet the rights of the public—that is, of the state—must be the paramount and moving consideration.

Section 6255 of the Revised Codes, among other things, provides: "No action to obtain an injunction must be commenced in the supreme court, except in cases where the state is a party, or in which the public is interested, or the rights of the public are involved, but the proper district court has jurisdiction of all injunctions, and the commencement of all actions therefor, except as in this section provided. The supreme court may provide rules for the commencement and trial of actions for injunctions in that court." As has already been said, the use

of the writ and its associates is by the Constitution lodged exclusively in the discretion of this court. Therefore the legislature may not define or limit their use. Nevertheless, in this provision we have a legislative definition of the purposes for which it may be used, which is the same, though expressed in different terms, as that laid down in *State ex rel. Clarke v. Moran, supra*. Under the definition thus made by the legislature, a right of the state, or, what is the same thing, some public [4] interest, must be the subject of the controversy, put in issue by the state itself as a party, or by someone acting in its behalf or by its authority. In the case of *Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517, this court issued a writ of injunction. But this was as an auxiliary only, for the purpose of preserving the subject of the action until the appeal could be determined. This was in no sense an exercise of original jurisdiction.

In this case no interest of the public—that is, of the state—is involved. In its comprehensive sense, the term "public" is the opposite of the term "private," and applies to the affairs of the state or some division thereof, as opposed to those of a private citizen. A municipality, such as the city of Helena, [5] possesses two classes of powers: (1) Those which are governmental, legislative, or public; and (2) those which are proprietary or private, or, as is sometimes said, *quasi* private. In the exercise of the first, it is an instrumentality of the state government, and, to the extent of its powers of this character, it is a part of the state sovereignty. It is the public to its inhabitants and those who fall within the purview of its authority. In the exercise of the second class of powers, it does not act as an agency of the government, but rather as a legal personality or corporate individual representing the private advantage of the compact community for the government of which it is created. (1 Dillon on Municipal Corporations, 4th ed., sec. 66; *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518, and cases cited.) Therefore, in seeking to provide a water system and a supply for itself

and its inhabitants, it acts exclusively in its private corporate [6] capacity, and, in all controversies arising in connection with this enterprise, it stands, for the time being, upon the same footing as any other private corporation, and is entitled to invoke the same remedies, and no others. In the prosecution of this proceeding it acts in its private capacity; not as a representative of the sovereignty of the state. Therefore it must be remanded to the appropriate district court for such relief as it may be entitled to.

In anything said herein we do not wish to be understood as holding that a state court may in any case issue an injunction to stop proceedings in a federal court.

The order to show cause is set aside, and the proceeding dismissed.

Dismissed.

MR. JUSTICE HOLLOWAY: In *State ex rel. Clarke v. Moran*, this court determined that it does not have the jurisdiction sought to be invoked in this proceeding, and, while I do not subscribe to all that is said in that case, the decision ought not to be reversed except for the most cogent reasons. It is necessary that due consideration be given the former decisions of courts of last resort, to the end that litigants may know upon what they are to rely. I concur in the result reached by the Chief Justice, primarily upon the ground of *stare decisis*; but, if it be assumed that this court has original jurisdiction in equity cases, the record before us does not justify an order directing the dismissal of the suit in the federal court or the suit instituted by the Custer Mines Consolidated Company; and, with those cases pending, it is not made to appear that any advantage whatever would accrue to the city of Helena by having the Lokowich suit dismissed. If this court has jurisdiction, it ought to be exercised only in cases where the wrong to be averted is imminent and substantial relief can be awarded. The presentation of a mere abstract right, without any beneficial result to flow from it, is not sufficient to justify interference.

MR. JUSTICE SMITH: I dissent. While I agree, in a general way, with the conclusions of law reached by the Chief Justice, I am yet of opinion that the very extraordinary and remarkable circumstances leading up to the institution of the case of *Lokowich et al. v. City of Helena* demand that this court enjoin the further prosecution of that action.

WASHOE COPPER CO., APPELLANT, v. JUNILA ET AL.,
RESPONDENTS.

(No. 2,955.)

(Submitted April 3, 1911. Decided April 17, 1911.)

[115 Pac. 916.]

Mines and Mining—Quartz Lodes—Placer Claims—Known Veins Within Boundaries of—Declaratory Statements—Insufficiency—Evidence—Patent—Conclusiveness—Declarations—Inadmissibility—Trial—Stipulations—Construction.

Mines and Mining—Placer Claims—“Known Veins” Within—Public Property.

1. If at the time application for patent to a placer location was made a vein or lode was known to exist within its boundaries but was not claimed or referred to in the patent, such vein or lode remained public property of the United States, mining operations upon which could not be enjoined by the successor in interest of the original placer patentee.

Same—Character of Vein—Evidence.

2. Evidence touching the character and extent of a quartz lode within the boundaries of a patented placer location, as disclosed by development made after application for patent, which lode was claimed by defendants to have been excluded from such patent because of the fact that it was well known at that time but not claimed by the patentee, was properly admitted.

Same—Declaratory Statement—Verification—Evidence.

3. A declaratory statement of a quartz lode location, not verified as required by the law in force at the time it was made, was void; hence the reception of a certified copy thereof in evidence was error.

Same—Constructive Notice—Void Instrument Ineffectual.

4. A void instrument cannot impart constructive knowledge to anyone.

Same—Placer Claims—Known Vein Excluded—Constructive Knowledge.

5. To exclude a lode from a placer patent, because of the failure of the patentee to lay claim thereto at the time of his application for patent, its existence must have then been known, either to him personally or to the community generally, constructive knowledge on his part sufficing.

Same—Declarations—Admissibility in Evidence.

6. One who offers in evidence the declaration of a person through whom he traces his title to land must show (a) that it was made while the declarant was holding title; (b) that he was in fact the grantor of the party against whom the declaration is offered; and (c) that the declaration was against interest.

Same—Declarations—Inadmissibility.

7. In an action for damages for ores extracted from a vein within the boundaries of plaintiff's patented placer claim, defendants introduced the deposition of the original owner of the ground, for the purpose of proving by statements contained therein that at the time application for placer patent was made, there was a known quartz vein within the boundaries of the claim. *Held*, that, in the absence of proof that the declarant was the owner of the property at the time the declaration was made, or that he was the grantor of plaintiff, the deposition was hearsay and inadmissible against plaintiff.

Same—Declarations—Inadmissibility.

8. Under the rule that the declarations of a person while the owner of land may not be introduced in evidence to either sustain or destroy the record title, the deposition referred to in paragraph 7 above was further inadmissible because its direct effect was to destroy title to that portion of the placer crossed by the vein and a strip of land twenty-five feet wide on either side thereof.

Same—Placer Patent—Conclusiveness.

9. Evidence that placer mining operations have never been carried on upon the premises included in a placer patent is inadmissible to overcome the effect of the patent; the fact that the ground was and is placer is conclusively established by its issuance.

Same—Trial—Issues—Stipulation—Construction.

10. A stipulation admitting that defendants, who by mesne conveyances had become the successors in interest of the locators of certain lode claims, "have acquired whatever right was obtained by the location" of such claims, was not an admission that the location of any one of them was valid or that the locators acquired any rights whatever thereunder, but simply relieved defendants from deraigning their title after proving valid locations of the claims.

Appeal from District Court, Silver Bow County; John B. McClellan, Judge.

ACTION by the Washoe Copper Company against John Junila and others, in which W. H. Hall and others intervene. From a judgment for defendants and intervenors, plaintiff appeals. Reversed and remanded.

Mr. C. F. Kelley, Mr. L. O. Evans, and Mr. D. Gay Stivers submitted a brief in behalf of Appellant. *Mr. Kelley* and *Mr. Evans* argued the cause orally.

While certain admissions or declarations of a grantor or predecessor in title, while holding the title, are held to be ad-

missible in evidence against the successor in interest, thus varying the rule as to hearsay evidence, there are certain exceptions and limitations to this rule, one of the most important being that while the declarations of a party in possession of land are held to be admissible against his grantee so far as said admissions or declarations go to show the nature or character of such possession, they are not permitted for the purpose of defeating or denying the title conveyed by the grantor to the party against whom the declarations or admissions are offered. In other words, verbal or written declarations of a grantor are not permitted for the purpose of showing that the grantor had disclaimed or disputed or disproved the title conveyed by him, or to impair or destroy the record title. (*Dodge v. Freedman's Saving & Trust Co.*, 93 U. S. 383, 23 L. Ed. 920; *Phillips v. Laughlin*, 99 Me. 26, 105 Am. St. Rep. 253, 58 Atl. 64, 2 Ann. Cas. 1; *Gibney v. Marchay*, 34 N. Y. 303; *Carpenter v. Hollister*, 13 Vt. 552, 37 Am. Dec. 612; *Jackson v. Cary*, 16 Johns. 302, 6 N. Y. Com. Law Rep. 149.)

To constitute a vein a "known vein," it must be shown, either that the placer applicants had actual knowledge of its existence, or that its existence was generally known in the community, or that from workings or disclosures on the ground, the existence of the vein must have been obvious to anyone making the reasonable inspection required of the placer applicants. (*Iron Silver M. Co. v. Mike & Starr G. & S. M. Co.*, 143 U. S. 394, 12 Sup. Ct. 543, 36 L. Ed. 201, 17 Morr. Min. Rep. 436; *Brownfield v. Bier*, 15 Mont. 403, 39 Pac. 461.)

The vein at the time of application for patent must have been such as would justify exploitation. This doctrine has become so thoroughly established and is so uniformly announced, that citations are not necessary. The following cases among many show the prevailing principle: *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; *Iron Silver Min. Co. v. Mike & Starr G. & S. M. Co., supra*; *Butte & Boston C. M. Co. v. Sloan*, 16 Mont. 97, 40 Pac. 217; *Casey v. Thievierge*, 19 Mont. 341, 61 Am. St. Rep. 511, 48 Pac. 394,

18 Morr. Min. Rep. 624; *Noyes v. Clifford*, 37 Mont. 138, 94 Pac. 842; *Montana Central Ry. Co. v. Midgeon*, 68 Fed. 811.

The vein must have been clearly ascertained at the time of application for placer patent. A vein cannot be said to be known from mere outcroppings or indications, but must be clearly ascertained. (*United States v. Iron Silver Min. Co., supra*; *Sullivan v. Iron Silver Min. Co.*, 143 U. S. 431, 12 Sup. Ct. 555, 36 L. Ed. 214.)

The vein or lode must be of such character and extent as to render the land more valuable on that account, and in this case it was incumbent upon interveners to show that the ground was more valuable on account of the quartz vein than for placer purposes. (*United States v. Iron Silver M. Co., Brownfield v. Bier, Noyes v. Clifford, supra*.)

The issuance of the placer patent determined conclusively that the ground included therein is placer in character. (*Steel v. St. Louis Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; *Butte & Boston C. M. Co. v. Sloan*, 16 Mont. 103, 40 Pac. 217.)

Mr. John J. McHatton submitted a brief in behalf of Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought by the Washoe Copper Company against Junila and others to recover damages for ores extracted from ground claimed by the plaintiff, and for an injunction to restrain further trespasses.

The plaintiff alleges its ownership in and to an irregularly shaped piece of ground in the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 18, township 3 N., of range 7 W., in Silver Bow county. The defendants answered, admitting that they had mined in a portion of the ground claimed by plaintiff, denied plaintiff's ownership of such portion, alleged that they were merely lessees of others who claim to be the owners, and pleaded affirmatively

that plaintiff's only claim of ownership to the ground described in the complaint is by virtue of mesne conveyances from the original patentees of placer 765; that, when application for patent to such placer was made, there existed within the boundaries of the placer claim a well-known lode or vein; that the applicants for placer patent did not apply for patent to such lode or vein, and the same was excepted from the placer patent; and that all acts done by defendants were done upon such known lode or vein. Thereafter Hall and others filed a complaint in intervention, in which they set forth substantially the same facts as those pleaded affirmatively by the defendants, and other facts to which reference will be made hereafter. They describe particularly the ground claimed by them, and conclude with a prayer for general relief. Issues were joined upon all the affirmative allegations contained in the answer and the complaint in intervention, except that plaintiff admitted that its only claim of ownership is by virtue of mesne conveyances from the original placer patentees. The trial court found in favor of the defendants and interveners, and rendered a decree in favor of interveners, adjudging them to be the owners of the ground claimed by them. From the decree and an order denying it a new trial, the plaintiff has appealed.

1. Error is predicated upon the action of the trial court in overruling plaintiff's demurrer to the affirmative defense pleaded in the answer of defendants. But we think there is not any merit in the contention; for even assuming that sufficient facts are not pleaded to entitle defendants to affirmative relief—and they do not seek any—still the facts, which, if true, show the existence of a known vein within the ground claimed by plaintiff at the time the application for placer patent was made, state a defense to plaintiff's cause of action; for, if such known vein existed, it remained public property of the United States, [1] and plaintiff will not be heard to object to defendants carrying on mining operations upon it. (*Reynolds v. Iron Silver M. Co.*, 116 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774.)

2. Complaint is made of the action of the court in admitting evidence of the condition upon the ground, particularly

as to the character and extent of the vein disclosed by development [2] made since the placer application. The question involved was determined by this court adversely to appellant in *Noyes v. Clifford*, 37 Mont. 138, 94 Pac. 842.

3. As a part of their proof, interveners introduced in evidence, over the objection of plaintiff, a certified copy of the declaratory statement of the Morning Star quartz lode mining claim. This declaratory statement purports to have been made by Charles Colbert in 1877, and recites that on July 2, 1877, Colbert made discovery of mineral-bearing rock in place at a point which is now within the boundaries of the ground claimed by plaintiff. It is conceded that the declaratory statement was not verified as required by the law in force at the time; but in offering the certified copy counsel for interveners said: "The purpose of offering this, may it please the court, is not to prove title under the location itself, but for the purpose of showing that this vein was known to exist at the time when he located it by Charles Colbert, and to show what was done by Charles Colbert and others with reference to working the vein." In *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302, this court held that a declaratory statement which does not contain the required [3] affidavit is void, and that decision has been followed uniformly since. (See *Hickey v. Anaconda Copper Min. Co.*, 33 Mont. 46, 81 Pac. 806.) Since the Morning Star declaratory statement was void, the receipt in evidence of a certified copy of it was error.

It is apparent from the statement of counsel made when the copy was offered that the purpose of introducing it was to show general knowledge on the part of the people of the community that a vein existed within the boundaries of the placer prior to the application for patent, presumably upon the theory that proof of such condition in 1877 would tend in some degree to establish knowledge of a similar condition when the application for placer patent was made in February, 1880. That a [4] void instrument cannot impart constructive knowledge to anyone is elementary; and the fact that the trial court admitted this evidence, and that in finding No. 1 reference is made to

the Morning Star location, and the further fact that the court did not find specifically that the placer patentees had actual knowledge of the existence of the vein at the time when they applied for patent, but only that they had such knowledge, actual or constructive, seem to justify the conclusion that the court must have attached some importance to the contents of this declaratory statement.

In order to exclude a lode from a placer claim, the lode must have been known at the time the application for placer patent [5] was made; but actual knowledge on the part of the placer applicant is not absolutely essential. In *Iron Silver Min. Co. v. Mike & Starr G. & S. Min. Co.*, 143 U. S. 394, 12 Sup. Ct. 543, 30 L. Ed. 201, it is said: "It is enough that it be known, and in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent or known to the community generally, or else disclosed by workings and obvious to anyone making a reasonable and fair inspection of the premises for the purpose of obtaining title from the government." This rule has been followed in the mining states generally. (*Brownfield v. Bier*, 15 Mont. 403, 39 Pac. 461.)

It seems a fair inference from this record that the placer patentees who denied actual knowledge of the existence of a vein within the boundaries of their placer claim at the time of their application for patent were charged with knowledge of the existence of such vein by the evidence furnished by this declaratory statement. In so far as the copy of the declaratory statement was offered to prove the extent or character of the work done by Colbert, it was subject to the objection that it was not the best evidence, in addition to the other objection considered. The immateriality of the evidence is also apparent, since neither plaintiff nor interveners claimed under the Morning Star location. In fact, the evidence shows that that claim was abandoned.

4. The interveners also introduced in evidence, over the objection of plaintiff, a deposition of Charles Colbert, taken in 1895, in an action entitled *Montana Central Ry. Co. v. Midgeon*

et al. The deposition was not taken in a case in which any of the parties in this action were interested, but it is contended that it was competent to prove by it declarations made by Colbert to the effect that there was a known lead, lode, or vein within the boundaries of placer 765 at the time the application for placer patent was made, and this upon the theory that at the time the declarations were made Colbert owned the placer ground now claimed by the plaintiff, and that the declarations were against interest. If the admission of these declarations can be justified at all, it must be done under the provisions of section 7866, Revised Codes, as follows: "Where, however, one derives title to real property from another, the declaration, act or omission of the latter, while holding the title in relation to the property, is evidence against the former." This section is but declaratory of the common law. It does not add to or subtract from the rule as it existed prior to the adoption of the statute. (*Frink v. Roe*, 70 Cal. 296, 11 Pac. 820.) In this last case the California court said: "Any declarations, acts or omissions of the grantor while holding the title in relation to the property, and which could have been introduced against him while an owner, may be introduced against his grantee—nothing more." In 1 Jones on Evidence, section 241, the reason for the rule is given as follows: "The principle upon which such evidence is received is that the declarant was so situated that he probably knew the truth, and his interests were such that he would not have made the admissions to the prejudice of his title or possession, unless they were true. The regard which one so situated would have to his interest is considered sufficient security against falsehood." (See, also, 2 Wigmore on Evidence, sec. 1080.)

However, when a declaration of this character is offered, the party making the offer must show (a) that it was made while [6] the declarant was holding the title to the property in controversy; (b) that the declarant was in fact the grantor of the party against whom the declaration is offered; and (c) that the declaration was against interest. The only evidence in this record touching Colbert's title to any portion of placer 765 is

furnished by a deed from Marsh and Nichols, the original placer patentees, to Emory, Tong, and Colbert, dated April 19, 1880, and conveying the following described property: "All that portion of lot numbered seven in section eighteen, T. 3 N., R. 7 W., lying north of a line drawn parallel with the south boundary line of said Lot No. 7, 10.91 chains distant therefrom; excepting that piece conveyed to George W. Maston." It appears sufficiently that lot 7, mentioned above, is placer 765; but, since there is not any description whatever given in this record of the portion which had theretofore been conveyed to Maston, it is impossible to know whether Colbert ever owned the land in controversy, whether he owned it at the time the declarations were made, or whether plaintiff derived its interest from Emory, Tong, and Colbert, or is the successor in interest of Maston. Under the pleadings, it was unnecessary for plaintiff to prove its chain of title from the original placer patentees; and since the interveners had the burden of showing that Colbert was the [7] grantor of plaintiff and failed, the declarations made by Colbert were hearsay and inadmissible against the plaintiff, under the provisions of the Code section cited above. (*Harrell v. Culpepper*, 47 Ga. 635.)

But the declarations were inadmissible for a further reason. Whatever interest Colbert acquired in placer 765 he retained until 1900. It appears, also, that he was one of the locators of the Green Copper quartz claim, which location it is alleged in the complaint in intervention was made in 1891, and it is fairly inferable that whatever interest, if any, he acquired in the quartz location he retained until after 1895. If we assume, then, that the portion of the placer conveyed to Colbert included the ground now claimed by plaintiff, and that the Green Copper was a valid quartz location, neither of which appears as a fact from this record, then we are confronted with this situation: Colbert while claiming a piece of ground as placer, and also claiming a portion of the same under a quartz location, makes a declaration against his placer interest and in favor of his quartz claim; that is to say, his declaration is to the effect that there was a vein—the one upon which the Green Copper

was located—within his portion of the placer at the time the application for the placer patent was made. The effect of this declaration, if true, is to prove that the extent of his placer claim is less than it purports to be; and, having conveyed away all that his placer purports to have been, the direct effect of this declaration is to destroy title to that portion of the placer [8] crossed by the vein, and a strip of twenty-five feet on either side thereof. In other words, his declaration destroys the record title to that portion of the placer. In *Dodge v. Freedman's Savings & Trust Co.*, 93 U. S. 379, 23 L. Ed. 920, the supreme court of the United States said: "Such declarations are competent only to show the character of the possession of the person making them, and by what title he holds, but not to sustain or to destroy the record title."

5. In a number of instances the court permitted the interveners to show, over plaintiff's objection, that there had never been any placer mining carried on on placer 765. The evidence was altogether immaterial. The placer patent to Marsh and Nichols established conclusively the fact that the ground was and is placer; and the effect of the patent cannot be overcome [9] by evidence that placer mining operations were never carried on. (*Dahl v. Raunheim*, 132 U. S. 260, 10 Sup. Ct. 74, 33 L. Ed. 324; *Butte & Boston Min. Co. v. Sloan*, 16 Mont. 97, 40 Pac. 217.)

6. The trial court found that at the date of the application for placer patent there was a well-known lode within the boundaries of placer 765 disclosed in workings at the Morning Star shaft; that the vein was such as to except it from the general grant of the placer patent, under section 2333, United States Revised Statutes (U. S. Comp. Stats. 1901, p. 1433). The complaint in intervention alleges that in June, 1889, Henry L. Haupt made discovery of mineral-bearing quartz in place within the boundaries of placer 765, and upon the same lode or vein which was known to exist at the time application for placer patent was made; that Haupt made and completed his location, designating it the Sunbury quartz lode mining claim. It is also alleged that in January, 1891, Ginsberg and others made dis-

covery of mineral-bearing quartz in place upon the same vein within the boundaries of placer 765; that they made and completed the location of the Green Copper quartz lode mining claim; that by mesne conveyances the interveners became the successors in interest of the locators of the Sunbury and Green Copper claims, and thereafter filed for record an amended declaratory statement of the Green Copper claim, "and ever since have held and owned the property under said amended declaratory statement." All these allegations were denied. Upon the trial, the interveners did not offer any evidence in support of the allegations above. It is insisted, however, by counsel for [10] interveners that they were relieved from making such proof by a stipulation entered into by counsel for the respective parties at the trial, as follows: "First, that the plaintiff has acquired whatever right was given by [the placer] patent to the original patentees to the premises that are herein in dispute; second, that the interveners have acquired whatever right was obtained by the location of the Green Copper, the Sunbury, and the Green Copper as amended."

In finding No. 8 the trial court accepted interveners' theory, and decreed to them the vein and 25 feet on each side for 1,500 feet, and thereby carved out of the ground claimed by plaintiff a parcel 50 feet wide and about 1,500 feet long. That the stipulation is not open to the construction given it is apparent. It is an admission by plaintiff that interveners acquired whatever rights were obtained by the locators of the Sunbury and Green Copper claims, and the Green Copper as amended; but it does not admit that any one of these claims was a valid location, or that the locators ever acquired any rights whatever by virtue of them. The stipulation did not go further than to relieve interveners from deraigning their title after proving valid locations of those claims. Upon the record before us, interveners were not entitled to affirmative relief. Assuming the existence of a known lode within the placer at the time the application for patent was made, such lode is open to location at this time, so far as we are informed by this record; and, if

so, the trial court cannot by its decree preclude the plaintiff or anyone else from locating it.

As said above, the interveners apparently based their claim upon the Green Copper location as described in their amended declaratory statement; but they plead that Haupt in 1889 located the Sunbury claim, while the Green Copper was not located until 1891, and the evidence discloses that the Green Copper discovery shaft is within the boundaries of the Sunbury claim; that, if the Sunbury was a valid location, it is difficult to understand how they can predicate any right upon the Green Copper claim, or the same claim as described in their amended declaratory statement.

Other questions are suggested in the briefs, but they are not necessary to a determination of the cause upon this appeal, and may not arise again; but for the errors heretofore considered the judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing denied May 20, 1911.

O'MEARA, RESPONDENT, v. McDERMOTT, APPELLANT.

(No. 2,958.)

(Submitted April 4, 1911. Decided April 17, 1911.)

[115 Pac. 912.]

Negotiable Instruments—Acceptance—Jury Question—Election of Remedies—Mistake—Effect—Trial—Attorneys—Misconduct—Argument—Discretion.

Judgment—Construction—Res Judicata.

1. In an action on a note and for services, a judgment construed, and held to show that the sole question decided was that an alleged agreement of partnership was never entered into between the parties, and that

hence plaintiff was not estopped to claim that the note was given for services.

Bills and Notes—Acceptance of Note—Jury Questions.

2. Whether the payee of a note refused to accept the same when offered to him, *held*, under the evidence, for the jury.

Election of Remedies—Mistake.

3. Where plaintiff first brought his action for an accounting, alleging that he was a partner of defendant, and as evidence that some amount was due him pleaded and produced a certain note, but the court found that no partnership existed, and that the note was given as evidence of an indebtedness arising out of a contract of employment, defendant could not thereafter urge that plaintiff could not try the question whether anything was due under the contract of employment.

Same—Mistake as to Remedy.

4. One who prosecutes a suit based on a remedial right which he erroneously supposes he has, and is defeated because of the error, has not made a conclusive election, and is not precluded from prosecuting an action based on an inconsistent remedial right.

Trial—Argument—Misconduct of Counsel—Discretion.

5. The matter of allowing counsel, during the argument of a cause, to use language deemed objectionable by appellant, is one controlled by a wise legal discretion of the court; in the absence of a showing of prejudice, a new trial on the ground of misconduct of counsel in that respect will not be granted.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by John H. O'Meara against Peter T. McDermott. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Messrs. Walsh & Nolan, and Mr. Jesse B. Roote, for Appellant, submitted a brief. Mr. C. B. Nolan argued the cause orally.

No suitor is allowed to invoke the aid of the courts upon contradictory principles of redress upon one and the same line of facts. As soon as the choice of remedies is made and one of the alternative remedies proffered by the law adopted, his act at once operates as a bar as regards the other, and the bar is final and absolute. It may be stated as the correct rule that, subject to certain exceptions which are not involved in the present case, the first pronounced act of election is final and imperative. It is certainly the established law, in every state that has spoken on the subject, that the definite adoption of one of two or more inconsistent remedies, by a party cognizant of

the material facts, is a conclusive and irrevocable bar to his resort to the alternative remedy. (*Towns v. Alford*, 2 Ala. 378; *Bryan-Brown Shoe Co. v. Block*, 52 Ark. 458, 12 S. W. 1073; *Rucker v. Hall*, 105 Cal. 425, 38 Pac. 962; *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92; *Herrington v. Hubbard*, 2 Ill. 569, 33 Am. Dec. 426; *Kepler v. Jessup*, 11 Ind. App. 241, 37 N. E. 655; *Bradley v. Brigham*, 149 Mass. 141, 21 N. E. 301, 3 L. R. A. 507; *Rowley v. Towsley*, 53 Mich. 329, 19 N. W. 20; *Sacker v. Marcus*, 43 Misc. Rep. 8, 86 N. Y. Supp. 83; *Long v. Long*, 111 Mo. 12, 19 S. W. 537; *Johnson-Brinkman Com. Co. v. Missouri Pac. Ry. Co.*, 52 Mo. App. 407; *Rice v. King*, 7 Johns. 20; *Morris v. Rexford*, 18 N. Y. 552; *Beloit Bank v. Beale*, 34 N. Y. 473; *Welch v. Seligman*, 72 Hun, 138, 25 N. Y. Supp. 363; *Colvin v. Shaw*, 79 Hun, 56, 29 N. Y. Supp. 644; *Lera v. Freiberg* (Tex. Civ. App.), 22 S. W. 236; *Bauman v. Jaffray*, 6 Tex. Civ. App. 489, 26 S. W. 260; *Warren v. Landry*, 74 Wis. 144, 42 N. W. 247; *Pine Lake Iron Co. v. Lafayette Car Works*, 53 Fed. 853; *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52.) It is a well-settled rule that a party cannot, by varying the form of action, or adopting a different method of presenting his case, escape the operation of the principle that one and the same cause of action shall not be twice litigated between the same parties or their privies. (Black on Judgments, 2d ed., sec. 729; *Hardin v. Palmeree*, 28 Minn. 450, 10 N. W. 773.)

In behalf of Respondent, there was a brief by *Messrs. Maury & Templeman*, and *Mr. Matthew F. Canning*. *Mr. H. L. Maury* and *Mr. Canning* argued the cause orally.

On the general question of estoppel by election and estoppel by judgment, there is a valuable note found under *Hudson v. Remington Paper Co.*, 6 Am. & Eng. Ann. Cas. 103. The point decided in this case is very salient to the issue: "Where the entry of judgment in an action involving several issues of fact recites a finding upon one of such issues that compels a judgment for the defendant, and is silent as to the rest, there is no presumption that they have been passed on, and in the

absence of some further showing that will be held open to inquiry in the future litigation between the same parties based upon a different cause of action."

An adverse decree in a suit for a share of the profits of partnership business as compensation for services rendered to a firm is not a bar to an action upon a *quantum meruit* for the value of such services. (*Kirkpatrick v. McElroy*, 41 N. J. Eq. 539, 7 Atl. 647.) A judgment dismissing an action for an accounting between copartners on a finding that no partnership existed is not a bar to an action for the services. (*Marsh v. Masterton*, 101 N. Y. 401, 5 N. E. 59.) A judgment is not available as an estoppel unless the particular controversy was necessarily tried and determined. The adoption of the wrong form of action does not operate as an estoppel. (*Bigley v. Jones*, 114 Pa. 510, 7 Atl. 54; *Elgin Nat. Watch Co. v. Meyer*, 29 Fed. 225.) A judgment in a proceeding for an accounting between plaintiff and defendant as partners, in which proceeding plaintiff set up a claim for services rendered the partnership, cannot, as a matter of law, be held to bar a subsequent action for services, against defendant individually, where there is some evidence that the services sued for were not embraced in the claim set up in the former proceeding. (*Kaster v. Welsh*, 157 Pa. 590, 27 Atl. 668.) On the general question as to whether a subsequently accruing cause of action can be held barred by prior adjudication, see the case of *Wagner v. Wagner*, 104 Cal. 293, 37 Pac. 935. Where a plaintiff declares on an account stated, and offers certain promissory notes as evidence to prove the fact of an accounting, but the evidence is rejected and judgment given against the plaintiff, this will not bar a future action by him on the notes. (Black on Judgments, par. 617.)

We call to the attention of the court a very careful opinion written by Judge Cooley: *Fifield v. Edwards*, 39 Mich. 264. The general tenor of which is: Estoppel from asserting a claim, excluded from a former suit, cannot apply where it was not within the issue in that suit, and there was no opportunity to establish it.

Where the money sued on in the second suit had not fallen due when the first suit was commenced, there can be no bar by reason of an adverse judgment in the first suit. (*Hallack v. Gagnon*, 4 Colo. App. 360, 36 Pac. 70; *Schmidt v. Louisville etc. R. Co.*, 27 Ky. Law Rep. 21, 84 S. W. 314; *Overton v. Gervais*, 6 Mart., N. S., 685; *Ahl v. Ahl*, 60 Md. 207; *Raymond v. White*, 120 Mich. 165, 78 N. W. 1071; *Doescher v. Spratt*, 61 Minn. 326, 63 N. W. 736; *Ramsey County Bldg. Soc. v. Lawton*, 49 Minn. 362, 51 N. W. 1163; *Armfield v. Nash*, 31 Miss. 361; *Burnside v. Wand*, 108 Mo. App. 539, 84 S. W. 995; *Jones v. Silver*, 97 Mo. App. 231, 70 S. W. 1109; *West v. Moser*, 49 Mo. App. 201; *Priest v. Deaver*, 22 Mo. App. 276; *Wheeler v. Bancroft*, 18 N. H. 537.)

MR. JUSTICE SMITH delivered the opinion of the court.

After this case was remanded for a new trial (see *O'Meara v. McDermott*, 40 Mont. 38, 104 Pac. 1049), the defendant amended his answer by pleading a former adjudication, predicated upon the judgment entered in favor of the defendants in the action brought by O'Meara and Kerrigan against McDermott and wife for an accounting of the profits resulting from the sale of the mining claims mentioned in the former opinion of this court, as alleged partners of McDermott. The amended answer also contains the allegation that by the commencement and prosecution of the so-called partnership action for an accounting, O'Meara elected to rely on his claim that he was a partner and to pursue such remedies as were open to him for the enforcement of that claim, and that, by reason of so electing, he is now estopped from prosecuting this action. The second trial resulted in another verdict against the defendant in the sum of \$12,000. Judgment was entered accordingly, and appeals were taken from the judgment, and from an order denying a new trial.

1. Appellant's contention that the judgment in the former action is a bar to the prosecution of this cause is untenable. The judgment and findings of fact made by the court disclose that

the sole question decided was that the alleged agreement of partnership was never entered into between the parties. The court filed a "decision" wherein the findings of fact are made. We shall treat this "decision" as findings of fact, which doubtless it was intended to be. Therein the court speaks of the circumstance that a note for \$12,000 was given, and says he is "persuaded this was done with O'Meara's and Kerrigan's full knowledge and consent as settlement for whatever services and information they gave McDermott in the sale of the claims." This language negatives the idea that the court decided that O'Meara had no claim of any kind against McDermott. At the second trial the court told the jury that on the former trial it was determined "that there never was any agreement of partnership between the parties hereto in relation to such matter, and that plaintiff was not a partner with defendant in such enterprise." We think this language fairly and fully construes [1] the judgment, and that the court in submitting the issues to the jury at the second trial correctly held, in effect, that the plaintiff was not estopped by the first judgment.

2. The court also instructed the jury as follows: "In order to make a note or other written obligation binding upon the party signing the same, it must not only be delivered to the payee or obligee, or to someone for him, but it must be accepted by him; that is, he must receive it into his possession intending to hold and enforce it against the payor or obligor pursuant to some precedent agreement in accordance with which it is delivered. If, accordingly, you find that the plaintiff on receiving from the defendant the instrument sued on, and acquainting himself with its contents, declined to accept it, and offered to return it to the defendant, and did not thereafter, and prior to bringing suit upon it, in some way signify to the defendant his acceptance of it pursuant to the agreement in accordance with which it was given to him, he cannot recover on it, and your verdict must be for the defendant." It is now asserted in appellant's brief that "the evidence clearly shows that the plaintiff abandoned the instrument in writing sued on in this action." At the second trial the stenographers who reported the

testimony at the first trial were placed upon the stand, and they testified as to certain alleged statements made by the plaintiff during the course of his examination. The substance of the testimony was that O'Meara then testified that he offered to return the note, but McDermott refused to take it back. O'Meara denied that he so testified, and said, among other things: "I didn't offer it to him, to have him take it back. I didn't hand it back to him either. I know positively that I never tried to force the note back on him. I know that particularly, because I never offered it to him." O'Meara gave other testimony which tends greatly to lessen the effect of that just [2] quoted, but in all the circumstances of the case we think the court properly submitted the question to the jury for decision.

3. It is contended that in electing to bring an action for an accounting as an alleged partner O'Meara estopped himself from afterward asserting that the note was given in payment for services rendered in any other capacity; and incidentally the [3] claim is made that he abandoned and repudiated the note and violated the agreement under which it was given, when he elected to sue as a partner. The first contention is thought to be established as a matter of law from an inspection of the record, and the second is deemed to be disclosed by the testimony as a fact; complaint being made in this connection that the court below refused to give certain instructions to the jury on that subject.

In the case of *Thompson v. Howard*, 31 Mich. 309, the court said: "A man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again." In that case the plaintiff's son was enticed away by a neighbor, and the father brought suit for the value of his services on the basis of an implied contract. The jury disagreed, and he thereupon

discontinued that suit and began an action in tort for enticing the boy away. The court held that the latter action could not be maintained, for the reason that in bringing the first suit the father had impliedly admitted that the services were performed with his assent.

In *Warren v. Landry*, 74 Wis. 144, 42 N. W. 247, Mr. Chief Justice Cassoday said: "The rule is universal that where a party has a choice between two inconsistent remedies or causes of action, and he deliberately adopts the one, such election becomes conclusive upon him and precludes him from subsequently adopting the other." (See, also, *Rowley v. Towsley*, 53 Mich. 329, 19 N. W. 20; *Bradley v. Brigham*, 149 Mass. 141, 21 N. E. 301, 3 L. R. A. 507; *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92; *Bryan-Brown Shoe Co. v. Block*, 52 Ark. 458, 12 S. W. 1073; *Bank of Beloit v. Beale*, 34 N. Y. 473; *Sanger v. Wood*, 3 Johns. Ch. (N. Y.) 416; *Morris v. Rexford*, 18 N. Y. 552; *Johnson-Brinkman C. Co. v. Missouri Pac. Ry. Co.*, 52 Mo. App. 407; *Nanson v. Jacob*, 93 Mo. 331, 3 Am. St. Rep. 531, 6 S. W. 246; *Long v. Long*, 111 Mo. 12, 19 S. W. 537; *Bauman v. Jaffray*, 6 Tex. Civ. App. 489, 26 S. W. 260; *Welch v. Seligman*, 72 Hun, 138, 25 N. Y. Supp. 363.) The foregoing cases are all more or less in point as illustrative of the rule above quoted from Michigan and Wisconsin, and are relied on by the appellant. It will be found on examination, however, that each decision is predicated upon a situation wherein the plaintiff had choice of remedies for the same act or omission of the defendant, as, for instance, where he ratified a fraudulent sale of his goods by bringing action for their value, or where he elected to sue in trespass rather than in *assumpsit*, and like cases.

The case principally relied on by the appellant, however, is *Sacker v. Marcus*, 43 Misc. Rep. 8, 86 N. Y. Supp. 83. In that case an action was brought to recover a sum of money for breach of a contract of employment and the wrongful discharge of plaintiff from the employ of the defendant. The answer, besides a general denial, contained an allegation that the plaintiff had begun another action, which was still pending upon the same contract, declaring that it was a contract of partnership,

and praying for an accounting. The court said: "It is to be observed from its language that this defense is not a plea of the pendency of another action for the same cause. The action at bar is for damages for breach of a contract for employment. The action referred to in this defense is an action in equity for the dissolution of a copartnership and an accounting. It is true that the plaintiff bases his two suits on the same contract, thus taking two views of the legal effect of that contract; but the views are absolutely inconsistent with each other. Both theories cannot be correct. It follows, therefore, that the plaintiff, having elected to bring his action on this contract in the supreme court on the theory that it created a partnership, elected and resorted to that remedy, and is bound by that election, and cannot afterward, and during the pendency of the former action, bring an action upon the theory that the same contract was one of employment." It will be noted that, after expressly stating that the defense was not a plea of another action pending for the same cause, the court says that the plaintiff may not prosecute the instant case during the pendency of the former action. We do not know what importance the learned judge who wrote the opinion attached to the fact that the action in equity was still pending. Certainly, if the decision is given the effect claimed for it by the appellant here, the result would be that even the dismissal of the former action would not place the plaintiff in a situation to prosecute the latter. That such is not the law in this state will presently be shown. The New York case is somewhat different from this in its facts also, as in that case the plaintiff was alleging at the same moment of time that the contract between himself and his opponent was one of employment and also of partnership.

The facts in this case are somewhat peculiar. In the action based upon an alleged partnership agreement, the complaint contained the following averment: "That he [McDermott] has refused to make any account, though he has acknowledged in writing and agreed to pay the plaintiff O'Meara the sum of \$12,000, when the payments shall be made by Galiger & Clymo, but he has not agreed to pay Kerrigan anything." Either one

party or the other produced the note now in suit at the trial of action for an accounting, and O'Meara was examined with reference to the circumstances under which it was given. The court in its decision said: "Later McDermott gives a note for \$12,000 to O'Meara, who is to give and does give his note for \$2,000 to Kerrigan. I am persuaded by the evidence that this was done, and with O'Meara's and Kerrigan's full knowledge and consent as a settlement for whatever services and information they gave McDermott in the sale of the claims." In this case O'Meara testified: "I did not bring suit upon this note afterward, instead of bringing an action for partnership profits, because that note was not due at the time that suit was instituted." And again: "Q. Were you satisfied with it when you read it? A. No; not satisfied with the amount." McDermott testified: "When I delivered the note, I certainly intended to pay it, * * * if I got my commission out of the Burke & Balaklava deal. I am the one who first suggested raising it from \$10,000 to \$12,000." From the testimony of O'Meara above quoted and the excerpt from his complaint, it is at once apparent that he did not intend to abandon the note or rescind the contract therein expressed. On the contrary, it is clear that he considered the note as evidence of a subsisting indebtedness on the part of McDermott either growing out of a partnership arrangement or a contract of employment. In *Kyle v. Chester*, 42 Mont. 522, 113 Pac. 749, this court said: "Ordinarily, when the conduct of a person is such as to raise a clear presumption that he does not intend to do a certain thing, he will not thereafter be charged with such intention by implication." (See, also, *State Bank v. Forsyth*, 41 Mont. 249, 108 Pac. 914, 28 L.R. A., n. s., 501.)

The doctrine of election of remedies is conceived to be founded in the very just idea that a party ought not to be needlessly harassed with litigation. But a person who prosecutes an action or suit based upon a remedial right which he erroneously supposes he has, and is defeated because of the error, has not [4] made a conclusive election, and is not precluded from prosecuting an action or suit based upon an inconsistent reme-

dial right. (15 Cyc. 262.) In the case of *Sullivan v. Ross' Estate*, 113 Mich. 311, 319, 71 N. W. 634, 76 N. W. 309, on rehearing it is said: "If, in choosing his remedy, the plaintiff has made a mistake, and for that reason failed, he is not cut off from pursuing the right remedy."

The rule as to conclusiveness of election "is not inconsistent with the practice of bringing a second and different action where it appears that the plaintiff never had a right of action as first brought, and therefore could not have elected. There is a difference between an election of remedies and a mistake of remedy, and the law has not gone so far as to deprive parties of meritorious claims merely because of attempts to collect them by inappropriate actions, upon which recovery could not be had." (*McLaughlin v. Austin*, 104 Mich. 489, 62 N. W. 719. See, also, *Agar v. Winslow*, 123 Cal. 587, 69 Am. St. Rep. 84, 56 Pac. 422.) And so in this case the plaintiff first brought his action for an accounting, alleging that he was a partner of the defendant. As evidence that some amount was due him, he pleaded and produced the note now in suit. The court found that no partnership existed, but that the note was given as evidence of an indebtedness arising out of a contract of employment. Having prevailed in that case solely on account of the fact that plaintiff mistook his remedy, the defendant is not now in a position to urge that the plaintiff has no right to have a competent court try the question whether anything is due under the contract of employment.

This court, in *Kaufman v. Cooper*, 39 Mont. 146, 101 Pac. 969, said: "There is a rule of law well established which is that if a person prosecute an action based upon a remedial right which he erroneously supposed he had, but which in fact he did not have, and he is defeated because of his error, he will not be held to have made an election of remedies, and will not be precluded from asserting one which he has, even though it be inconsistent with that which he supposed he had but did not have. A review of the history of the first case (*Kaufman v. Cooper*, 38 Mont. 6, 98 Pac. 504, 1135) convinces us that in that instance Kaufman merely made a mistake as to the remedy

available to him, and it ought not to be said that by making such mistake the admitted indebtedness of Cooper and Archibald to him was thereby satisfied. The law does not recognize that method of discharging one's liabilities."

We think the district court was correct in holding that O'Meara was not estopped as a matter of law.

4. But it is said that the court erred in refusing to charge the jury that if the note was given pursuant to an agreement between the parties, whereby they sought to adjust and settle any and all claims which O'Meara might have against McDermott, either as a partner or otherwise, and thus avoid litigation, and the plaintiff violated that agreement by beginning his action for an accounting, he could not recover on the note. We have carefully examined the evidence, and fail to find any testimony on the part of either O'Meara or McDermott that would have justified the court in giving these instructions. McDermott testified: "I could see trouble was brewing. I said to him: 'I have never been in trouble before, and I don't want to have any. If you and Kerrigan will give me a written satisfaction in full of all demands, I will give you a note for \$12,000.' The character of trouble that I was expecting to get into in view of these demands that they were making, and the kind of talk that they put up, was after I saw their attitude and language, and I thought that they would start a suit of some character, and it might prevent the company from completing their payments, and completing their contract, and so rather than have any trouble—as I told them at the time I never was in court—at the time I was willing to give this note for a written satisfaction. * * * I asked him then for a written satisfaction, and he said he would make it out and hand it to me. I subsequently had a talk with him about getting the written satisfaction." After the note was given he says he told O'Meara that he understood he was going to bring suit against him and Bishop Carroll, and O'Meara replied that he did not intend to bring suit. Again he testified: "I never made any proposition except this, and this was given for full satisfaction. The proposition that I have told about the clause,

the matter had of the terms specified in this note to be given in exchange for the satisfaction, was the only proposition that I made him." It is to be observed that the testimony of the defendant is to this specific effect: that he stipulated for a written satisfaction of all claims against him; that plaintiff agreed to give it and afterward violated the agreement. Plaintiff, in effect, denied that any such agreement was made. The court fairly submitted to the jury the question whether there was such an agreement, and they found for the plaintiff. It may be that McDermott had in mind a desire to avoid litigation, or "trouble," as he expressed it, and, if he did, he might well have stipulated that no suit growing out of previous transactions between himself and O'Meara should be commenced in case the note was given, but he claims no such agreement, and the general verdict against him determined that the note was given unconditionally.

Again, it is claimed that the motion for nonsuit should have been sustained on the ground that the respondent's testimony in chief disclosed the fact that such an understanding as we have been discussing was had between the parties and that he violated it; but, as heretofore stated, we do not think his testimony, confused and unsatisfactory as it is in many respects, will bear that construction, and appellant's version of the transaction specifically negatives the idea that such was the understanding of the parties.

5. Contention is made that the court erred in refusing to give the following instruction: "(8) It was determined and adjudged in the action referred to that no agreement of partnership was ever entered into between the parties hereto in reference to the Burke and Balaklava claims, or in connection with the effort to procure a purchaser for the same, and that no sum was ever due from the defendant to the plaintiff upon any agreement of partnership in such enterprise. If you find accordingly that the note in suit had no consideration other than a part or the whole of what was supposed to be due to the plaintiff as a partner on the transaction referred to, it is wanting in any legal consideration and your verdict must be for the defendant."

This instruction was properly refused. The court did charge the jury: "However firmly you may believe that the plaintiff is entitled to have something from the defendant either as a partner or for services, your verdict must be for the latter, unless you find that plaintiff is entitled to recover on the note." There never was any question that the note was given in payment for whatever services O'Meara had performed in connection with the sale of the Burke and Balaklava mining claims. He at first contended that he was a partner, and, in fact, he still so claims, notwithstanding the decision against him. But it is immaterial in this case how the relationship of the parties is characterized. Appellant will not be heard to say that the consideration for the note was services performed as a partner.

6. That payments were made on the Galiger & Clymo lease and option, substantially as agreed upon, is the law of the case. (See former opinion cited, *supra*.)

7. We find nothing in the affidavits on motion for a new trial which would warrant the court in reversing the judgment and order on account of misconduct of counsel during the argument [5] to the jury. The question of the propriety of applying epithets to litigants or opposing counsel is one which each attorney has the right to decide for himself, in accordance with his own ideas on the subject, and the facts in the case. The trial court will exercise a wise legal discretion in controlling such matters. We find no prejudicial error in that regard in this record.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied, May 20, 1911.

**SNIDER ET AL., APPELLANTS, v. YARBROUGH ET AL.,
RESPONDENTS.**

(No. 2,964.)

(Submitted April 5, 1911. Decided April 22, 1911.)

[115 Pac. 411.]

Mining—Option Contracts—Lease and Bond—Strict Construction—Rights of Lessor.

Contracts—Lease and Bond—When One Agreement.

1. A lease and contract to sell, contained in one writing, may constitute separate agreements, if their provisions are independent of each other; where, however, the provisions are interdependent, the instrument must be deemed an entity.

Option Contract—Definition.

2. An option is a right acquired by contract to accept or reject a present offer within a limited or reasonable time in the future.

Same—Time—Essence of Agreement.

3. The clause in an option contract that "time is of the essence of this agreement," held to have applied to the entire instrument and not to any particular paragraph thereof.

Same—Strict Construction.

4. Option contracts relating to mining claims, a character of property which is subject to violent fluctuations in value, are strictly construed, and time is deemed to be of the essence thereof.

Same—Mining—Lease and Bond—Rights of Lessor.

5. Plaintiff and defendant entered into a written contract by the terms of which the latter leased to the former a quartz lode claim with an option to purchase, payment of installments to be made at given dates, the agreement to convey to be void if the lessee should fail to pay the full purchase price on or before a certain day, "time being of the essence of this agreement." Plaintiff made the initial payment, and, failing to pay the second installment on time, secured an extension but again defrauded. Held, that defendant, electing to treat the agreement at an end, had a right to re-enter, take possession and relet the property to others.

Appeal from District Court, Madison County; J. B. Poindexter, Judge.

ACTION by D. R. Snider and others against Benjamin Yarbrough and others. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Cause submitted on briefs of counsel.

Messrs. Clayberg, Maloney & O'Flynn submitted a brief in behalf of Appellants.

The authorities hold that a mere default in the payment of an installment, if not coupled with facts showing an intent on the part of the party in default to renounce his liability under the contract, does not operate as a discharge of the adversary party. (*Mersey Co. v. Naylor*, 9 App. Cas. 434, affirming 9 Q. B. D. 648; *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248; *Palm v. Railway*, 18 Ill. 217; *Osgood v. Bauder*, 75 Iowa, 550, 39 N. W. 887, 1 L. R. A. 655; *Winchester v. Newton*, 2 Allen (Mass.), 492; *West v. Bechtel*, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791; *Beatty v. Lumber Co.*, 77 Minn. 144, 79 N. W. 1013; *Wharton v. Winch*, 140 N. Y. 287, 35 N. E. 589; *Bethel v. Improvement Co.*, 93 Va. 354, 57 Am. St. Rep. 808, 25 S. E. 304, 33 L. R. A. 602.)

"Where promises are divisible, that is, where the contract contains a number of promises to do a number of similar acts, a breach of one of them does not discharge the other party." (9 Cyc. 648; *Norris v. Harris*, 15 Cal. 226.) "Illustrations of divisible promises are to be found in contracts to receive and pay for goods by installments. Where the installments are numerous, extending over a considerable period of time, a default either of delivery or payment would not appear to destroy the contract, although it must necessarily give rise to an action for damages." (9 Cyc. 648.) Therefore, if the contract is to be construed as a whole, and plaintiff Snider was entitled to purchase the property on or before the thirtieth day of September, 1910, his failure to pay installments as they came due did not give Yarbrough the right to rescind the contract and treat it as null and void. (9 Cyc. 649.)

"Forfeitures are not favored in law, and conditions providing for the forfeiture of an estate are to be construed liberally in favor of the holder of the estate and strictly against an enforcement of the forfeiture. Conditions subsequent, when relied to work a forfeiture, must be created by express terms or clear implication, and are construed strictly." (*Behlow v. Southern Pacific R. Co.*, 130 Cal. 16, 62 Pac., at p. 295; *Randol v. Scott*,

110 Cal. 590, 42 Pac. 976.) "A lease working a forfeiture is strictly construed against the lessor." (*Sauer v. Meyer*, 87 Cal. 34, 25 Pac. 153.) "Forfeiture will be construed liberally in favor of the parties against whom it is to be enforced." (*People ex rel. Davidson v. Perry*, 79 Cal. 105, 21 Pac. 423; *Quatman v. McCray*, 128 Cal. 285, 60 Pac. 855.)

"Putting another tenant in without demand or notice to the lessee is not a proper way to enforce a forfeit." (*Kreutz v. McKnight*, 53 Pa. 319, 6 Morr. Min. Rep. 314.) The failure to pay the installments might, perhaps, give the defendant Yarbrough a right of damages against plaintiffs for failure to pay, but could not work a forfeiture as to rights growing out of the contract as a whole. (9 Cyc. 648.)

Messrs. Clark & Duncan submitted a brief in behalf of Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On March 30, 1909, plaintiff Snider and defendant Yarbrough entered into an agreement in writing, by the terms of which Yarbrough leased to Snider the Stella lode claim, and agreed to sell and convey the claim to Snider on or before September 30, 1910, provided Snider paid therefor \$3,500, as follows: \$500 upon the execution of the agreement; \$1,000 on September 30, 1909; \$1,000 on March 30, 1910, and the balance on September 30, 1910. By the provisions of the agreement, Snider was given possession of the property and permitted to carry on mining operations upon accounting for fifteen per cent of the value of ores shipped, after deducting the expenses of hauling, freight and treatment, and the royalties thus paid over were to be credited upon the purchase price. The agreement provides for the execution of a deed by Yarbrough and its deposit in escrow. The concluding paragraph reads: "But, if the party of the second part [Snider] shall fail to pay to the party of the first part [Yarbrough] the sum of thirty-five hundred dollars on

or before the thirtieth day of September, 1910, then the foregoing agreement to convey shall be null and void and no longer of any binding force or effect as against the party of the first part; time being of the essence of this agreement." Snider made the initial payment, took possession of the property, carried on mining operations extensively for some time, took out much ore and accounted for fifteen per cent of the net returns; but when the installment of September 30, 1909, became due he was unable to meet it, secured an extension of time for payment, but failed to make the payment within the time thus extended. Thereafter Yarbrough re-entered, took possession of the property, and leased it to defendants Connors and Beckely, who entered into possession and commenced mining operations. In the meantime Snider had assigned a certain interest in the agreement to Kelso, Newcombe, Dimmick, and Aumiller, and thereupon this suit was instituted to secure an injunction restraining defendants Connors and Beckely from further working the property, for a decree canceling the lease given to them, for the restitution of the property, and for an accounting for ores mined and disposed of. The complaint sets forth the facts much more in detail, and makes the agreement a part of it. To this complaint a demurrer was sustained, and plaintiffs, declining to plead further, suffered judgment to be entered against them, and appealed to this court.

There is but a single question presented, and that arises upon a construction of the peculiarly framed agreement. The instrument must be construed as an entity. While a lease and contract to sell contained in one writing may constitute separate [1] agreements if their provisions are independent (*Merk v. Bowery Min. Co.*, 31 Mont. 298, 78 Pac. 519), in the present instance the provisions are so completely interdependent that this instrument must be deemed an entirety, and this appears to be conceded.

The instrument cannot be treated as a contract of sale. It lacks an essential element of an enforceable bilateral agreement —mutuality. Yarbrough agreed to sell the property, but Snider did not bind himself to purchase it. The concluding paragraph

quoted above indicates beyond question that neither party considered Snider bound. The agreement is an option by which Yarbrough let Snider into possession with the right to mine and the privilege of purchasing upon the terms specified. "An option is a right acquired by contract to accept or reject a [2] present offer within a limited or reasonable time in the future." (21 Am. & Eng. Ency. of Law, 2d ed., 924; *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723.)

Having determined the character of the instrument, the question arises: Had Yarbrough the right to re-enter and take possession of the property upon the failure of Snider to meet the payment due September 30, 1909? It is insisted that the clause, "time being of the essence of this agreement," applies only to the provisions of the last paragraph, but this cannot be so. [3] Time is made of the essence of the agreement—not of the essence of one paragraph. The "agreement" referred to in the clause quoted must refer to the entire instrument. There is not anything to indicate a contrary purpose, and the parties will be presumed to have contracted with reference to the law in force.

Because of the advantageous position held by the one who has the option, a contract of this character is construed strictly, and time is deemed to be of the essence of it. (Pomeroy on Contracts, sec. 387; 8 Current Law, 2223.) Particularly is this true if the property is of such character as to be subject to violent fluctuations in value. (*Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 435, 36 L. Ed. 479.) The rule is now quite uniformly applied to options upon mining property. (*Clark v. American Dev. & M. Co.*, 28 Mont. 468, 72 Pac. 978; *Settle v. Winters*, 2 Idaho (Hasb.), 215 (199), 10 Pac. 216.) In 27 Cyc. 674, Mr. Clayberg, the author of the article, says: "The rule that, where the character of the property is such that it is liable to sudden fluctuations of value, time is of the essence of contracts relating thereto, is especially applicable to mining property, and such property requires, and of all properties perhaps the most requires, the persons interested in it to be vigilant

and active in asserting their rights. Hence it is uniformly held that time is of the essence of the contract in the case of an option on mining property, or a contract for the sale thereof, even though there is no express stipulation to that effect." To the same effect are Fry on Specific Performance, third edition, section 1052; 2 Lindley on Mines, section 859; 2 Snyder on Mines, section 1378.

The clause, "time being of the essence of this agreement," will be held to apply to every material provision of the agreement, and the failure of Snider to pay the installment due September 30, 1909, within the time agreed upon, rendered his [5] contingent interest in the property subject to termination at the election of Yarbrough, and he, having elected to treat the agreement at an end, could rightfully re-enter, take possession, and let the property to Connors and Beckely. (*Jennison v. Leonard*, 21 Wall. 302, 22 L. Ed. 539.) The very fact that Snider asked for an extension of time within which to make payment of the installment is evidence that he deemed the time clause applicable to the provision covering the payment of each installment. (*Wiswall v. McGown*, 2 Barb. (N. Y.) 270.) The wisdom of the rule is well illustrated in this instance. Snider did not bind himself to purchase the claim at all. He paid but \$500 for the option, and obligated himself to account for only fifteen per cent of the net proceeds of his mining operations. In the absence of the rule, he would have been free to carry on extensive mining for eighteen months, to take out great values in minerals, if they were there, to exhaust the claim, and at the expiration of his option decline to purchase and return it to Yarbrough valueless. The cases cited by counsel for appellants apply to bilateral contracts, and are not in point here.

The complaint having alleged the failure of plaintiffs to pay the installment due September 30, 1909, as agreed upon, does not state facts sufficient to entitle plaintiffs to any relief, and the demurrer was therefore properly sustained.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

SANDEN, APPELLANT, v. NORTHERN PACIFIC RY. CO.,
RESPONDENT.

(No. 2,961.)

(Submitted April 4, 1911. Decided April 22, 1911.)

[115 Pac. 408.]

Railroads—Carrier and Passenger—Contract of Carriage—Construction.

Carrier and Passenger—Contract of Carriage—Rule of Construction.

1. The rule that one who accepts a contract and avails himself of its provisions is bound by the stipulations and conditions contained in it applies to contracts of carriage, provided the conditions are reasonable and not prohibited by law.

Same—Special Contracts—Contracts—Presumptions.

2. One who purchases a railroad ticket at full fare is not required to read the printed matter thereon to ascertain whether there are in it unusual stipulations, and is, therefore, not presumed to have accepted conditions other than those imposed by law; where, however, he buys a ticket at a reduced rate, and the circumstances are such as to notify him of that fact, he is affected with notice of any unusual terms and conditions attached to its use and bound thereby, whether he reads them or not or is incapable of reading them.

Same—Special Contract of Carriage—Breach by Passenger—Ejection—When not Unlawful.

3. Plaintiff bought a second-class limited railroad ticket from St. Paul to Seattle. It provided that it was subject to exchange at any point on the route for a continuous passage ticket or check. A train auditor took up the ticket and delivered in its stead an exchange or identification check which contained a provision that stop-over privileges were allowable on the check, on application to the conductor, if it bore a thirty-day limit. Various conductors informed plaintiff that she could stop over at Butte for a day, as did also defendant's agent at the latter place. The next day, upon resumption of her journey, she was ejected from the train by the conductor, who refused to receive the check and demanded payment of fare. Held, that the check did not constitute a substitute contract for that contained in the ticket; that plaintiff was bound by the conditions printed thereon; that neither the conductors nor the agent had authority to waive the stipulation with reference to stop-over privileges, and that her ejection from the train under the circumstances was not unlawful. (Rev. Codes, sec. 5350.)

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by Mina Sanden against the Northern Pacific Railway Company. From a judgment for defendant, and an order denying her a new trial, plaintiff appeals. Affirmed.

Mr. James M. Hinkle, and Mr. Chas. A. Wallace, submitted a brief in behalf of Appellant; oral argument by both.

Respondent says its conductors in charge of said train had no authority to bind it with reference to appellant's right to stop over on said ticket. The law says that the principal is bound by the acts of the agent within the general scope of the employment, and especially is this true with railway companies. In 2 White on Personal Injuries on Railroads, section 735, the author says: "A passenger is entitled by virtue of his contract of transportation to protection against the negligence of the carrier's employees. The conduct of the carrier's employees, while transacting the business of the railroad company, and when acting within the general scope of their employment, is of necessity to be imputed to the company which constitutes them its agents for the performance of its contracts with passengers. It is immaterial that the company did not authorize or even know of the act of the employee causing the injury to the passenger, or even if it disapproved or forbade it, the carrier is equally liable if the act is done in the course of the employment. This rule is based on grounds of public policy and convenience."

Respondent says the ticket shows that it is a "second-class limited," because "second-class limited" is canceled or punched out. But the rule in contracts is that which is not canceled is what is in force, unless reference is made to the canceled parts. There is no reference made to "second-class limited" in this ticket. The traveling public are not required to know the internal rules of a railway company. (*Railroad Co. v. Winters*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; *Hufford v. Railroad Co.*, 64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544; *Railway Co. v. Graves*, 110 Tenn. 232, 100 Am. St. Rep. 803, 75 S. W. 729; 6 Cyc. 555.) *Sloane v. Railroad Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193, covers the questions in this case very fully in its various phases. The case of *Railroad Co. v. Winters*, *supra*, takes up the various questions which are involved in the

case at bar. (See, also, *Northern Pacific R. R. Co. v. Pauson*, 70 Fed. 585, 17 C. C. A. 287, 30 L. R. A. 730; *O'Rourke v. Railway Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639, 52 S. W. 872, 46 L. R. A. 614.) A railroad ticket should be construed most favorably for the passenger and against the carrier if there is any uncertainty or doubt in its terms. (1 Peters on Carriers of Passengers, sec. 276.)

The case of *Tarbell v. Northern Central Ry. Co.*, 31 N. Y. Sup. Ct., 24 Hun, 51, which was a continuous passage ticket, is decisive of the case at bar. The syllabus in that case is as follows: "Where a passenger, upon applying for information to a train agent or conductor, is informed by him that he may get off at a station and continue his journey by the next train upon the same ticket, and the passenger, relying upon the said statement, leaves the train at that station, the company is bound to carry him on the next train to the end of his route upon that ticket, and is estopped from denying the authority of the conductor to make the second agreement." The *Tarbell Case* has been cited with approval in later opinions of the courts, and we have been unable to find any cases wherein it has been cited with disapproval. (2 White's Personal Injuries on Railroads, sec. 735; *New Jersey Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; *Railroad Co. v. Quigley*, 62 U. S. 210, 16 L. Ed. 73.)

Railway tickets are prepared by the carrier; they contain more or less of printed and other directions; some passengers cannot read, others are children, none of them have time or opportunity in the rush of travel to scrutinize the ticket; and if they did, many could not understand the devices and punch-marks used by the company. They do not understand the significance of the punch-marks. Those things are to advise the conductors and agents of the internal rules of the company; but the courts have said, relating to that subject: "The traveling public are not required to understand those significations." (See *Railway Co. v. Graves*, 110 Tenn. 232, 100 Am. St. Rep. 803, 75 S. W. 729, and cases cited.)

In behalf of Respondent, *Mr. Wm. Wallace, Jr.*, *Mr. John G. Brown*, and *Mr. R. F. Gaines*, submitted a brief. *Mr. Brown* argued the cause orally.

The court did not err in excluding the evidence as to plaintiff's not reading the ticket, and as to the short time it was in her possession, and the other testimony going to excuse the plaintiff from the conditions of the ticket by reason of her not having read, or had an opportunity to read, its terms and provisions. It is admitted that the ticket purchased and giving her the right to be carried was a signed agreement. We insist that this was the only contract between the parties. There is no pleading of fraud practiced or imposition made in the signing of the ticket, duress, or other circumstance that would relieve the plaintiff from the contract. On the contrary, the evidence shows that she accepted the contract and traveled on it without protest. Plaintiff was bound by the conditions expressed in it. (*Boylan v. Railway*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290; *Daniels v. Railway*, 62 S. C. 1, 39 S. E. 762; *Fonseca v. Steamship Co.*, 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665, 12 L. R. A. 340; *Gulf etc. Ry. Co. v. Riney*, 41 Tex. Civ. App. 398, 92 S. W. 54; *Southern etc. Ry. Co. v. White*, 108 Ga. 201, 33 S. E. 952; *Freeman v. Railway*, 71 Kan. 327, 80 Pac. 592, 6 Ann. Cas. 118; *Heffron v. City Railway*, 92 Mich. 406, 31 Am. St. Rep. 601, 52 N. W. 802, 16 L. R. A. 345; *Boling v. Railway*, 189 Mo. 219, 88 S. W. 35; *England v. Railway*, 32 Tex. Civ. App. 86, 73 S. W. 24; *Coyle v. Railway*, 112 Ga. 121, 37 S. E. 163; *Hanlan v. Railway*, 109 Iowa, 136, 80 N. W. 223.) And this is true even though the party holding the ticket could not read or write. (*Watson v. Railway*, 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454.) Especially is it true in cases of railway tickets where the purchaser does not pay full fare, and that fact in itself is notice to him that some of the ordinary rights of travel and passage are, as to him, limited. (*Watson v. Railway*, 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454; *Elliott v. Railway*, 145 Cal. 441, 79 Pac. 420, 68 L. R. A. 393; *Boling v. Railway, supra*.) There is a presumption in the law that the ordi-

nary ticket only entitles the holder to a continuous passage, unless the contrary clearly appears. (*Wyman v. Railway*, 34 Minn. 210, 25 N. W. 349; *L. & N. Ry. Co. v. Klyman*, 108 Tenn. 304, 91 Am. St. Rep. 755, 67 S. W. 472, 56 L. R. A. 769; *Hatten v. Railway*, 39 Ohio St. 375; *Walker v. Railway*, 16 Am. & Eng. R. R. Cas. 386; *Churchill v. Railway*, 67 Ill. 390; Elliott on Railroads, sec. 1585; 6 Cyc. 583, note 77.) And this presumption is clearly founded upon reason. As is said by the editor of the L. R. A. series, there is remarkable uniformity in the decisions upon this question, all seeming to agree that there is no right to stop on the ordinary ticket, in the absence of a special agreement or regulation of the railway permitting it (28 L. R. A. 773).

The conductor's check was not a ticket; it was simply an evidence of the fact that plaintiff had purchased a ticket and was entitled to ride. (See *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671.)

So, too, in coupon tickets, it has been held that the original ticket or signed contract between the parties is what was to be looked to, and not an exchange check, which did not give privileges the ticket itself did. (*Palmer v. Railway*, 3 S. C. 580, 16 Am. Rep. 750.) So, too, where the original ticket was sold to one person and was nontransferable, and the exchange check did not so specify, and was sold to another, the second man had no right to ride. (*Walker v. Railway*, 15 Mo. App. 333.)

Upon the point whether or not a conductor or agent of the company can vary an original signed agreement of the parties, the following cases are squarely in point: *Mosher v. Railway*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249; *McGhee v. Reynolds*, 117 Ala. 413, 23 South. 69; *International Ry. Co. v. Best*, 93 Tex. 344, 55 S. W. 315; *Petrie v. Railway*, 42 N. J. L. 449; *Railway Co. v. Henry*, 83 Tex. 678, 19 S. W. 870, 16 L. R. A. 318; *Coyle v. Railway*, 112 Ga. 121, 37 S. E. 163; *England v. Railway*, 32 Tex. Civ. App. 86, 73 S. W. 24; *Hanlan v. Railway*, 109 Iowa, 136, 80 N. W. 223; *Ellis v. Railway*, 30 Tex. Civ. App. 172, 70 S. W. 114; *Texas etc. Ry. v. Smith*, 38 Tex. Civ. App. 4, 84 S. W. 852; *Ketcheson v. Railway*, 19 Tex. Civ. App. 288,

46 S. W. 907; *Lake Shore etc. v. Pierce*, 47 Mich. 277, 11 N. W. 157; *O. & M. Ry. v. Hatton*, 60 Ind. 12; *Elliot v. Railway*, 145 Cal. 441, 79 Pac. 420, 68 L. R. A. 393.

The conductor's punch-marks being of such common usage and so universally recognized and known, and the plaintiff knowing the limitations of her original contract, we would urge that it was her own negligence in not advising herself what the punch-marks on the "second-class limited" meant, that caused her confusion and resulting trouble. (*Aplington v. Pullman Co.*, 97 N. Y. Supp. 329, 110 App. Div. 250.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The purpose of this action is to recover damages alleged to have been sustained by plaintiff by being wrongfully ejected from one of defendant's trains by the conductor in charge thereof.

On October 7, 1907, Frank Sanden purchased at the ticket office of defendant at St. Paul, Minnesota, transportation for himself and plaintiff, his wife, represented by two tickets, from that point to the city of Seattle, Washington, by way of Butte, Montana. The tickets were in the form of contracts, both signed by the husband. It is not controverted that in signing plaintiff's ticket her husband acted as her agent, and that she was bound by the stipulations contained therein in so far as she should be bound by them. The body of the ticket is the following:

"Good for One Continuous Second-Class Passage.

"St. Paul (U. D.) Minn., to Seattle, Wash.

"Subject to the following contract:

"1st. This ticket is not good for passage if it shows any alterations or erasures.

"2d. In accepting this ticket, which is not transferable, having been sold at a reduced rate, the holder whose signature is attached hereto, expressly agrees to use the same for a continuous trip to destination before midnight of date canceled by punch mark in margin; otherwise the holder further expressly agrees to forfeit this ticket and pay full fare to destination.

"3d. The purchaser agrees that the value of his [or her] baggage does not exceed \$100.

"4th. This ticket is subject to exchange, either whole or in part, at any point on the route for a continuous passage ticket or check.

"A. M. CLELAND, General Passenger Agent.

"[Signed] FRANK SANDEN, Purchaser.

"[Signed] Witness."

The punch-marks on the margin allowed up to and including October 12 within which to complete the journey. The two immediately entered a regular through train of defendant, bound to their destination. A short distance from St. Paul the train auditor took up both tickets and delivered in their stead exchange or identification checks, of which the following is a copy:

30 Day Limited	1st Class Limited	2d Class Limited	Half
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"Northern Pacific Railway Co.

"Conductor's Exchange Check. Non-Transferable,
and subject to forfeiture if presented by any person other than the original
holder,

"To Point Cancelled in Margin.

"This check entitles the holder, whose appearance must correspond with description indicated by punch marks in left-hand margin, to one passage of class, and to the destination cancelled hereon. The date cancelled in margin indicates the limit of ticket in lieu of which this check is issued, and this check must therefore be used to destination before midnight of such date. Stop-over may be allowed on this check if it bears a thirty-day limit (upon application to conductor).

"A. M. CLELAND, Gen'l Passenger Agent."

The punch-marks in the margin of the one delivered in lieu of plaintiff's ticket indicated the physical description of the plaintiff, the destination to which she was bound, the date at which her journey should end, and also that the ticket for which the check was issued was a second-class limited ticket. On the back, under the words "Signature of Passenger," is written the signature of Frank Sanden. It is admitted that he signed this also as the agent of plaintiff. On the way between St. Paul and Butte the plaintiff and her husband, desiring to stop off at the latter place, applied to the conductors on the different divisions to know whether they were entitled to stop-over privileges on the tickets purchased by them. They were informed that they were, but were referred to the conductor in charge on the run into Butte. As the train was approaching Butte, they inquired of this conductor as to their right to stop-over privileges. They were informed that they could stop over for one day and take the same train on the following day, but that they had best consult the ticket agent at Butte. This they did when the train arrived there, and were advised by him that, since their tickets allowed them one day longer than the schedule time between

St. Paul and Seattle, they could stop over for that one day. Thereupon both left the train and remained there during the day. On the next day, intending to resume their journey, they entered the train indicated by the conductor and agent. When their tickets were demanded, they presented the exchange checks. The conductor refused to accept them, though both informed him of what had been told them by the agent at Butte and the conductor in charge on the preceding day, and required them to pay full fares or leave the train. They declined to pay the required fares, and when the train reached Durant, a small station in the mountains about eighteen miles west of the city, they left it. This was between 9 and 10 o'clock in the evening. They remained there until 2 o'clock on the following morning, when they returned by train to Butte. It is not alleged, nor does it appear, that the conductor used any force or threats to induce them to leave the train. Nor does it appear that they were exposed for want of proper shelter.

The theory of the complaint is that the plaintiff had the right to rely upon the information given by the conductor and the agent at Butte, and that, notwithstanding she received no written permission from either to stop over, she was nevertheless entitled after being verbally informed by them that she could stop over to resume her journey and complete it to her destination. The pleadings are voluminous, but present only two issues, *viz.*: Whether the conductor or the agent, or both, gave plaintiff the information alleged, and the extent of the injury which she suffered. Upon the facts shown by the evidence, substantially as stated above, the trial court, being of the opinion that the plaintiff was not entitled to recover, directed a nonsuit, and judgment was entered for the defendant accordingly. The appeal is from the judgment and an order denying plaintiff's motion for a new trial.

The contentions made by counsel for plaintiff may be stated thus: (1) That by taking up the ticket purchased at St. Paul, and delivering in lieu thereof the exchange or identification check, the defendant substituted a new and different contract from that contained in the ticket, that under the recitals con-

tained in the check the question whether the plaintiff was entitled to stop-over privileges was left to the conductor to whom she applied to decide, and that, having decided as he did, she was entitled to act upon his decision; and (2) that, though the recitals in the check are not subject to the construction given them by the conductor, and she would otherwise have been bound by the terms contained in the ticket, yet she had a right to rely upon the information given her by the conductor. The argument is that in either case the conductor of the second train had no right to eject her, and hence that the defendant is liable for the wrong suffered by her at his hands.

The substitution of the check for the ticket in no wise changed the terms of the original contract. The check clearly indicated by its recitals and the punch-marks on the margin the class of passage to which the holder was entitled, and the limit within which the trip must have been completed. It clearly indicated the time limit of the ticket in lieu of which it was issued. It also contained the information that a stop-over could be allowed only in case the check which indicated the same limit bore upon its face a thirty-day limit. A casual reading of it, with an observation of the punch-mark cancellations, even if she had not read the ticket, would have informed the plaintiff that she was entitled to a continuous passage only within the limit designated. Since it was stipulated in the ticket that it would at any time be subject to exchange for the check, and since the check in no wise changed any of the conditions and stipulations in the ticket, its only office was to identify the plaintiff and the character of her contract. It was therefore not a substituted contract with different terms and conditions, but left the original ticket contract to control the rights of the parties. Nothing was left to the discretion of the conductor.

By the current of authority the rule is well settled that one who accepts a contract and proceeds to avail himself of its provisions is bound by the stipulations and conditions contained [1] in it; and the rule applies to contracts of carriage, both of passengers and property, provided only the conditions are reasonable, and not prohibited by law. (*Brian v. Oregon Short*

Line R. R. Co., 40 Mont. 109, 105 Pac. 489, 25 L. R. A., n. s., 459; *Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290; *Mosher v. St. Louis I. M. etc. R. Co.*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665, 12 L. R. A. 340; *Daniels v. Florida Central P. R. Co.*, 62 S. C. 1, 39 S. E. 762; *Gulf, C. & S. F. Ry. Co. v. Riney*, 41 Tex. Civ. App. 398, 92 S. W. 54; *Southern Ry. Co. v. White*, 108 Ga. 201, 33 S. E. 952; *Freeman v. Atchison, T. & S. F. Ry. Co.*, 71 Kan. 327, 80 Pac. 592; *Heffron v. Detroit City Ry.*, 92 Mich. 406, 31 Am. St. Rep. 601, 52 N. W. 802, 16 L. R. A. 345; *Hanlon v. Illinois C. R. R. Co.*, 109 Iowa, 136, 80 N. W. 223; *Hill v. Syracuse, Bing. & N. Y. R. Co.*, 73 N. Y. 351, 29 Am. Rep. 163; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Harris v. Gr. West. Ry. Co.*, L. R. 1 Q. B. D. 515; *York Co. v. Illinois Central Ry. Co.*, 3 Wall. 107, 18 L. Ed. 170.) He is bound by the terms of the contract, whether he has read them or not. (*Boylan v. Hot Springs R. Co.*, *supra*; *Watson v. L. & N. R. Co.*, 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454; *Daniels v. Florida Central P. R. Co.*, *supra*.)

The ordinary card ticket for which full fare is paid is generally regarded as a mere token or check, the purpose of which is to indicate the route over which the passenger must travel. Upon a sale of it the law makes the contract. The purchaser is not expected to read the printed matter thereon to ascertain [2] whether there are any unusual stipulations, because he is not put upon his guard, nor has he had his attention directed to them, so that he may be presumed to have accepted conditions other than those which the law imposes. (*Fonseca v. Cunard Steamship Co.*, *supra*; *Watson v. L. & N. R. Co.*, *supra*; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535; *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469.) If, however, he has purchased a ticket at a reduced rate and the circumstances are such as to notify him of this fact, he is bound by the printed conditions upon it, whether he reads them or not or whether he is capable of reading them. (*Watson v. L. & N. R. Co.*, *supra*.)

In this case the plaintiff not only expressly agreed to the limitations embodied in the ticket, but did so in consideration of the reduced rate at which she obtained it, and hence must be presumed to have understood them. Her right to recover, then, depends upon whether the conductor and agent, or either, at Butte, had authority to waive any stipulation in the contract so as to permit her to stop over. If this is so, the defendant was bound by their action; the plaintiff and her husband had the right to resume their journey at the end of the time limit fixed by them; the conductor of the train which they entered for this purpose committed an actionable wrong in ejecting them from it; otherwise, they were trespassers, and he was authorized to eject them. (Rev. Codes, sec. 5350; *Mosher v. St. Louis, I. M. & S. Ry. Co., supra*, and cases cited.)

Now, what right had the plaintiff to accept and act upon [3] the statements of either the conductor or agent? By the terms of the contract she was bound to know that she was to make a continuous trip under the penalty of forfeiting her ticket and being compelled to pay full fare, and hence that she was not entitled to a stop-over. By the statement contained in the check, which plainly indicated what her rights were, she was notified that upon that kind of a ticket the conductor was not authorized to grant a stop-over. Hence she is not in a position to claim either that she was misled by the statement of the conductor or that he had authority to waive the stipulation with reference to the stop-over. Upon the face of it was expressed the condition under which he, and he only, could grant the privilege. She was also bound to understand that the agent had no authority to bind the defendant by his action. He had not sold the ticket, and therefore was not acting within the apparent scope of his authority. The plaintiff was properly nonsuited.

The case of *Tarbell v. Northern Central Ry. Co.*, 24 Hun (N. Y.), 51, is not in point. In that case the plaintiff was entitled to a stop-over upon the ticket purchased by him. The regulations of the defendant required the holder of a ticket who desired to stop over at an intermediate station to apply to the

conductor for a stop-over ticket. The plaintiff upon application to the conductor was told that he could stop over at such a station and take the next train. He did not obtain a stop-over ticket, but left the train relying upon the statement of the conductor. It was properly held that he had the right to complete his journey on the next train, from which he was ejected, because he was entitled to rely upon the statement of the conductor. The conductor had a general authority to grant stop-over privileges. So far as the plaintiff was concerned, it was not of moment how the conductor executed this authority.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

FLAVIN, RESPONDENT, *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO., APPELLANT.

(No. 2,976.)

(Submitted April 8, 1911. Decided April 22, 1911.)

[115 Pac. 667.]

Railroads—Carrier and Passenger—Ejection from Train—Action for Damages—Excessive Verdicts.

Appeal and Error—Review—Verdict—Conflicting Evidence.

1. A verdict on conflicting evidence will not be reversed on appeal as contrary to the weight of the evidence, after the trial court has overruled a motion for a new trial.

Carriers—Damages—Excessiveness—Personal Injuries.

2. Plaintiff claimed that, on account of being ejected from defendant's passenger station while waiting for a train, he contracted a severe cold, which settled in his stomach, turned into neuralgia and pleurisy, and left him permanently injured; that since his injury he had suffered great pain, and had been hindered from carrying on his work. His physician testified that his condition was due to exposure; that he was suffering from chronic pleurisy, and would get worse, rather than better; and that this condition could be caused by getting wet and cold. Held, that a verdict allowing plaintiff \$2,500 was not excessive.

Appeal from District Court, Silver Bow County; John B. McClellan, Judge.

ACTION by William Flavin against the Chicago, Burlington and Quincy Railroad Company. Judgment for plaintiff, and defendant appeals from it and an order denying it a new trial. Affirmed.

Mr. O. F. Goddard, for Appellant, submitted a brief and argued the cause orally.

Messrs. Breen & Jones submitted a brief in behalf of Respondent. *Mr. Peter Breen* argued the cause orally.

MR. JUSTICE SMITH delivered the opinion of the court.

The complaint in this action alleges that on the 24th day of July, 1908, the plaintiff purchased from the defendant corporation a ticket entitling him to ride from Yuma, in the state of Colorado, to Crawford, in the state of Nebraska, over the defendant's railroad; that defendant then and there undertook to carry him from Yuma to Crawford upon its next passenger train, at the usual time of departure of said train, which was 4:10 o'clock in the morning; "that plaintiff undertook then and there to wait in defendant's depot in the waiting-room thereof, and waited therein from the time of his arrival and purchase of said ticket for about one hour for the arrival of said train, when said train was reported by defendant to be one hour late, and thereafter no further report was made by the defendant to the plaintiff as to the time when said train would arrive at Yuma; that said town of Yuma is a small place, having but one hotel, situated about four blocks from the depot, and that there was in said town no other place of accommodation or shelter for strangers; that plaintiff left said hotel immediately before buying said ticket; that the hotel was then and there closed and remained closed for the night; that about 4:30 o'clock in the morning of said day the defendant wrongfully and unlawfully, and against the protest of plaintiff, threw all of plaintiff's baggage out of the depot, and expelled and ejected him therefrom, and locked all the doors thereof and put out all the lights therein; that said night was very cold, and the plaintiff was thinly clad, and there was no

other place of shelter or accommodation which plaintiff could have used while waiting for said incoming train, and there was no means of removing his baggage to such place of shelter, had there been any, and returning it to the depot, in order to put it on said train when it arrived, and that, without any fault or negligence on plaintiff's part, he was then and there, by the wrongful acts of defendant in expelling him from said depot waiting-room, and compelling him to wait around and near said depot till the arrival of his said train, exposed to the darkness and discomfort and cold then and there existing, to-wit, from the time of his said expulsion from said depot, till 6 o'clock in the morning of said day, and that all the facts mentioned in the foregoing paragraphs of this complaint were well known to the defendant." It is then alleged that by reason of the premises plaintiff was "then and there greatly hurt, bruised, and wounded, and became and was sick, sore, and lame, and disordered, and seized with a violent and severe cold and fever, which settled in his stomach and turned into neuralgia and pleurisy of his side and stomach, and was, as he believes, permanently injured, and since said injury and up to the present time the plaintiff has suffered great pain, and has been and is hindered and prevented from carrying on his work as a miner, and was otherwise greatly injured and damaged." The answer puts in issue the material allegations of the complaint.

The trial resulted in a verdict for the plaintiff in the sum of \$2,500. Judgment was entered on the verdict, and from that judgment and an order denying its motion for a new trial, the defendant has appealed to this court.

The plaintiff testified that, having spent a part of the night at a small hotel in Yuma, Colorado, he and his wife arose about 3 o'clock in the morning, went to the station of the defendant company, and asked the agent when the train would leave for Crawford, Nebraska. The agent told him the train was ten minutes late, and that the schedule time for leaving was 4:10. About fifteen minutes later plaintiff's wife inquired about the train, and the agent told her that it was an hour late. About 4:30 o'clock the agent came to the plaintiff and his wife in the wait-

ing-room, said that his time of service expired at 4:30, and insisted that they should leave, as he was about to lock up and go away. Plaintiff requested permission to stay in the waiting-room, which the agent refused. He and his wife thereupon left the waiting-room and went upon the platform, where they remained until about 6 o'clock, when the train arrived. During this time it rained very hard and became very cold. Plaintiff was saturated with water and took a severe cold. From that time on the disease of which he now complains developed and grew worse.

Plaintiff was corroborated in all of his testimony by his wife. They both swore that it rained very hard during the afternoon of July 23 while they were at Yuma, but that the weather generally was exceedingly warm. They also swore that the reason they could not go to the east side of the depot platform, which was sheltered, after they were compelled to leave the waiting-room, was because there were five tramps in the place, who were using such vulgar and obscene language that Mrs. Flavin could not remain in their vicinity. They also declared that the hotel was closed, and that they could not return to it. The plaintiff also testified that some time after 5 o'clock in the morning Mr. Pate, the day agent of the Burlington Road, came down from his apartments over the waiting-room, and was requested to open the waiting-room and allow the plaintiff to enter, but that he refused, saying that he did not go on duty until 7 o'clock.

Dr. McCarthy testified for the plaintiff in substantiation of his claim that his present condition is due to exposure to which he was subjected on the night in question. The doctor testified that he was suffering from a condition of chronic pleurisy, and that he would get worse, rather than better. The doctor said, "It is permanent, progressive. It will get worse. It will get worse as age advances. It is progressive in character; it will get worse. This condition could be caused by cold. It could be caused by getting wet and cold."

On the part of the defendant, many seemingly disinterested witnesses were produced who contradicted categorically almost every material fact testified to by the plaintiff and his wife.

The night agent or operator denied that he compelled the plaintiff to leave the waiting-room. He said that the night was warm and balmy, and the plaintiff and his wife spent the time after their arrival sitting on a bench outside of the waiting-room; that he was about to leave at 4:30 o'clock, and informed them that his time of service had expired, talked pleasantly with them, and that they made no objection whatsoever to his closing the waiting-room. Many citizens of the little town of Yuma testified that no rain fell, either on the afternoon of July 23 or the following night. They all agreed that the weather was very warm, clear, and pleasant. Both the night agent, Mr. Huston, and the day agent, Mr. Pate, testified that the night was so warm that a small child of the latter, sixteen months old, which was being weaned at the time, spent the night in a go-cart on the platform, without any other clothing than a thin nightgown. There was testimony to the effect that the hotel was open all night. Dr. Witherspoon was called as a witness for the defendant, and testified that in his judgment the plaintiff was suffering from an obstruction of the gall bladder, caused by gallstones.

There are but two assignments of error argued in the brief of appellant. The first is that the evidence is insufficient to justify the verdict, and the second is that the verdict is excessive. We have carefully examined the testimony. As shown by the brief summary heretofore given, it is sharply conflicting. While the members of this court, had they been called upon to try the cause in the first instance, might (and the writer of this opinion assuredly would) have determined that the great weight of the testimony was in favor of defendant's contentions, still the questions involved were primarily for the jury to decide; and, as there was testimony on the part of the plaintiff and his wife to justify the findings of the jury, we may not substitute our judgment for theirs. It is difficult to see how this jury, in the light of the testimony of the many apparently disinterested witnesses called by the defendant, could conclude that any rain fell upon the plaintiff on the night in question, or that he was subjected to any hardship, or even inconvenience, on account of the weather. But the jury must have so determined, and must have

based their verdict solely upon the testimony of Flavin and his wife.

As the question of the credibility of these witnesses was [1] entirely for that body to decide, their determination is conclusive upon this court, particularly since the same has been ratified by the district court in overruling a motion for a new trial. (*Murphy v. Cooper*, 41 Mont. 72, 108 Pac. 576.)

The same may be said as to the testimony relating to the extent of plaintiff's injuries. Assuming that the evidence of Dr. McCarthy as to his present condition is true, that alone would [2] not justify the amount of the verdict, were it not for the fact that the plaintiff and his wife both testified that prior to the alleged exposure the plaintiff was in good health. If this testimony is to be given any consideration, then the verdict is not excessive.

It is claimed on the part of the learned counsel for the appellant that a great injustice was done the defendant by the jury. But, so long as we adhere to the jury system and give effect to those uniform rules which must be observed in the determination of appeals, this court is not in a situation to listen to counsel's appeal.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

**BOEHME, ADMINISTRATRIX, APPELLANT, v. FITZGERALD,
RESPONDENT.**

(No. 2,969.)

(Submitted April 6, 1911. Decided April 22, 1911.)

[115 Pac. 413.]

***Partnership—Actions Between Members—Death of Partner—
Effect—Administrators—Complaint—Insufficiency.***

Mining Partnership—Death of Member—Effect.

1. The death of a mining partner does not dissolve the partnership; the estate of the decedent succeeds to his interest and occupies the same relative position that he would occupy if alive.

Partnership—Actions Between Members—When not Maintainable.

2. In the absence of a settlement of the partnership business, one partner cannot maintain an action at law against his copartner with reference to the partnership affairs.

Same—Administrators—Complaint—Insufficiency.

3. A complaint by the administratrix of the estate of her husband in an action against the remaining member of a partnership of which decedent had also been a member, to recover partnership profits, which failed to allege that a settlement or adjustment of the partnership business had been had, did not state a cause of action.

***Appeal from District Court, Silver Bow County; John B.
McClernan, Judge.***

ACTION by Elizabeth Boehme, as administratrix of John Boehme, against John Fitzgerald. Judgment for defendant, and plaintiff appeals. Affirmed.

In behalf of Appellant, *Messrs. Maury & Templeman*, and *Mr. J. O. Davies*, submitted a brief. *Mr. Davies* argued the cause orally.

Mr. James T. Healy and *Mr. James H. Baldwin* submitted a brief in behalf of Respondent. *Mr. Healy* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action to recover the sum of \$7,311.50 and interest. The complaint alleges that, prior to and at the date of the death

of John Boehme, a partnership existed between Boehme, Roberts, and Fitzgerald; that the partnership property consisted of a certain mining lease; that Boehme owned seven-sixteenths of such interest; that, from the death of Boehme, Roberts and Fitzgerald operated the property covered by the lease for fourteen months at a net profit, over all expenses, of \$17,910; that Boehme's estate was entitled to \$7,836.50; that Fitzgerald retained the portion belonging to Boehme's estate, and, though demand has been made upon him, he has refused to pay over the same, or any part, except the sum of \$525. Issues were joined, and the cause brought to trial. The court sustained an objection to the introduction of any evidence on the part of the plaintiff, and rendered and had entered a judgment for defendant. From that judgment this appeal is prosecuted. The only question presented is: Does the complaint state a cause of action?

It is not clear, from the allegations of the complaint, whether Boehme, Roberts, and Fitzgerald were mining partners or general trading partners. If they were mining partners, the death [1] of Boehme did not operate to dissolve the partnership, and his estate succeeded to his interest, and occupies the same relative position that Boehme would occupy, if alive. (27 Cyc. 763; *Higgins v. Armstrong*, 9 Colo. 38, 10 Pac. 232; *Hawkins v. Spokane Hydraulic Min. Co.*, 3 Idaho, 241, 28 Pac. 433.) Since the other partners owned a majority interest, they were entitled to the management and control. (Rev. Codes, sec. 5544.) If the relationship existing between these parties was that of general trading partnership, the death of Boehme dissolved the partnership (section 5494); but the surviving partners were still entitled to continue in possession and to settle the partnership affairs (section 7607). It would be their duty to account to the administratrix of Boehme's estate, and upon failure to do so they could be compelled by summary proceedings. (Section 7607, above.) The section of the Code to which reference has just been made also provides that the administratrix may maintain against the surviving partner "any action which the defendant could have maintained." In the matter of relief, then—aside from the remedy furnished through the probate court—

the personal representative of the decedent occupies the same relative position, with reference to the surviving partners, that the deceased, if alive, would sustain to his copartners.

In the absence of a settlement of the partnership business, [2] one partner cannot maintain an action at law against his copartner with reference to the partnership affairs. This rule is recognized uniformly. (30 Cyc. 461, and cases cited.) In *Doll v. Hennessy Mercantile Co.*, 33 Mont. 80, 81 Pac. 625, this court said: "One partner cannot sue his copartner at law to recover his share of the firm assets. The amount to which he is entitled always depends upon a settlement of the partnership affairs and an adjustment of the balances between the partners"; citing *McMahon v. Thornton*, 4 Mont. 46, 1 Pac. 724. In *Riddell v. Ramsey*, 31 Mont. 386, 78 Pac. 597, we said: "The individual interest of one partner in the firm assets can only be ascertained by a settlement of the partnership [citing cases]. Such settlement can only be accomplished by agreement of the partners, or by an action in equity for an accounting, settling their several interests." The reason for the rule which denies to one partner the right to sue another at law before a settlement is had is apparent. One partner does not own or have a right to any specific portion of the partnership property. Section 5469, Revised Codes, provides: "The interest of each member of a partnership extends to every portion of its property." In Parsons on Partnership, section 112, it is said: "Every partner owns the whole partnership property, subject to equal ownership of every other partner; and no one partner can make his own ownership of any part absolute, or relieve it from the encumbrances of the ownership of the others, without their consent. * * * But, although no partner owns absolutely any part of the property, he has an interest in the whole." In 30 Cyc. 444, the same thing is said in effect, as follows: "The interest of a partner in the firm assets is not that of a tenant in common, or of a joint tenant, at common law. It is the share to which he is entitled under the partnership contract, after the firm debts are paid and the partners' equities are adjusted."

Confessedly, the profits made by Roberts and Fitzgerald belonged to the partnership, and constituted a part of the partnership assets (Rev. Codes, secs. 5468 and 5485); but until a settlement of the partnership affairs is had, one partner cannot assert a right to any particular portion of the firm property. In 30 Cyc. 445, it is said: "As firm property is not owned by the partners in severalty, but belongs to the partnership, it follows that neither partner is entitled to exclusive possession of the firm estate, or of any item of property composing it. If a partner wrongfully asserts such exclusive possession, the other partners may obtain relief in equity; but they cannot maintain a purely possessory action at common law."

This complaint does not state whether there are firm debts outstanding, whether losses were incurred prior to Boehme's death, or whether any settlement or adjustment of the partnership business has ever been had. In *Riddell v. Ramsey*, above, this court held, in harmony with the authorities generally, that a [3] complaint in an action at law by one partner against another, which fails to allege that a settlement has been had, does not state a cause of action. Since Boehme's personal representative is not in any better position in this respect than Boehme himself would be, if alive, this complaint does not state a cause of action, and the trial court's ruling was correct.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

PIPER ET AL., RESPONDENTS, v. MURRAY ET AL., APPELLANTS.

(No. 2,962.)

(Submitted April 5, 1911. Decided April 22, 1911.)

[115 Pac. 669.]

Building Contracts—Extra Work—Presumptions—Burden of Proof—Evidence—Jury—Waiver—Instructions.**Contracts—Actions for Breach—Pleading—Allegations as to Certificate of Architects.**

1. Where a complaint, in an action on a building contract brought by the contractors, alleged performance of the contract according to its terms, and that the architects' certificate, authorizing final payment, had been demanded, and that it was refused for no fault of plaintiffs, but because of a suit begun against the architects by the defendants, it is sufficiently shown that the certificate was withheld arbitrarily, or for a cause over which the plaintiffs had no control, and such showing is all that is necessary.

Same—Building Contracts—Extra Work—Necessity of Order.

2. Where a building contract provides that no extra charges shall be made unless there shall be an order in writing fixing the price, there can be no charges for extra work, whether alterations in the plan of doing the work, or additions in and about the building, unless the order or certificate has first been made.

Same—Actions for Breach—Evidence—Presumption.

3. In an action on a building contract, the terms of which provide that nothing was to be considered an extra unless agreed upon in writing, and in which no writing is produced, there is a presumption, in the absence of writing, that there were no extras.

Evidence—Parol Evidence Affecting Rights—Contracts for Building.

4. Plaintiffs brought action upon a building contract, by the terms of which nothing was to be considered an extra unless agreed upon in writing, before the doing of such extra work, and signed by the owner, the contractors, and certified by the architects, and, without pleading or showing any modification or waiver of the terms of the contract, plaintiff was permitted to testify that the plans and specifications had been changed, and that extras had been agreed upon in writing, and to state the total amount of such extras without producing any agreements in writing. *Held*, that the effect of this testimony was to erroneously modify a written contract by parol evidence.

Contracts—Action for Breach—Burden of Proof.

5. In an action on a building contract for compensation, by the terms of which there was to be no change of the specifications and no extra work unless agreed upon in writing, the burden of showing that there were extras to which payments made under the contract might be applied was on the plaintiff.

Evidence—Matters Directly in Issue—Substantial Performance of Building Contract.

6. Where one of the plaintiffs, in an action to recover a balance on a building contract, gave testimony showing that he was an expert on contract work, he was properly allowed to testify that he constructed the building, furnished the materials, and performed the work in general conformity with the plans and specifications.

Same—Opinion Evidence—Cross-examination of Expert.

7. Where an expert on contract work was called in a contractors' action for a balance alleged to be due under a written contract, and testified as to the fact of certain cracks in the concrete upon the building, he could not properly be asked on cross-examination where he would place the blame therefor, or whose duty it was to provide for expansion and contraction of the cement work.

Same—Opinion Evidence—Conclusion of Witness.

8. In an action by contractors upon a building contract in which there was evidence of substantial performance, a question to a witness, who had made an inspection of the building and testified to certain defects in construction, whether in his opinion, as a practical builder, the contractors were entitled to receive, or the architects entitled to give, a final certificate of the work according to the plans and specifications, was properly excluded as calling for a conclusion of the witness, which was for the architects under the contract, and ultimately for the jury.

Trial—Appeal and Error—Review—Discretion of Trial Court—Permitting Jury to Inspect Building.

9. The matter of allowing the jury, in an action on a building contract, to inspect the building many months after its alleged completion, was within the sound legal discretion of the trial court, which will not be reviewed unless an abuse is shown.

Contracts—Action for Breach—Instruction—Waiver.

10. In an action by a contractor upon a building contract, which provided that no certificate given or payment made, except the final certificate or payment, should be conclusive evidence of the performance of the contract, either wholly or in part, and that no payment should be construed as an acceptance of defective work, and in which no waiver of such certificate was pleaded, an instruction that, although the contract provided that payment should be made to plaintiffs only upon the architects' certificate, yet, if defendant had made payments without requiring the production of such certificates, then such requirement had been waived, and the failure to procure such certificate was not a bar to this action, was erroneous as not applicable to the theory of plaintiff's action.

Trial—Instructions—Reading Instructions Together.

11. Instructions, which are correct when read in connection with other instructions, are not erroneous.

Appeal from District Court, Park County; Frank Henry, Judge.

ACTION by W. E. Piper and Ernest F. Piper, copartners doing business under the firm name of the Piper Construction Company, against James A. Murray and The Monida Trust. Judgment for plaintiffs, and defendants appeal from it and an order denying them a new trial. Reversed and remanded.

Mr. James E. Murray, and Mr. O. M. Harvey, submitted a brief in behalf of Appellants. **Mr. Murray** argued the cause orally.

The complaint does not state facts sufficient to constitute a cause of action. The production of the architects' final certificate was

a condition precedent in the contract relied upon by plaintiffs, and it was necessary for plaintiffs to allege and prove its production, or show that it was waived by defendant, or withheld by collusion between the architects and the defendants, or fraud of the architects. The mere allegation that the architects refused the same because the defendant Murray had "started a suit against them" is not sufficient. In all of the authorities cited in the case of *McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 428, it will be found that the plaintiffs were excused from producing the certificate because the same was withheld by reason of the fraud or mistake of the architects, or because of some collusion between the architects and the defendants. (*Hudson v. McCartney*, 33 Wis. 331; *Hanley v. Walker*, 72 Mich. 607, 45 N. W. 57, 8 L. R. A. 207; *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790; *Michaelis v. Wolf*, 136 Ill. 68, 26 N. E. 384; *Byrne v. Sisters of Elizabeth*, 45 N. J. L. 213.) It is true defendants waived this condition to the extent of the payments which they voluntarily made without requiring a compliance therewith, but it would not follow that by so doing they were debarred from insisting upon it whenever they saw fit to do so for their protection, nor would it tend in the least degree to excuse the plaintiffs from performing it on their part before they would be entitled to maintain an action for any balance which might be their due. (*Brown v. Winehill et al.*, 3 Wash. 524, 28 Pac. 1037; *McNamara v. Harrison*, 81 Iowa, 486, 46 N. W. 976.)

Where the contract provides that extras shall not be charged for without a written order, nothing but a written order will support the claim. (*Vandewerker v. Vermont Ry.*, 27 Vt. 130; *Baltimore Co. v. Coburn*, 7 Md. 202; *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635.) This question is elaborately considered and decided by this court in the case of *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280. The plaintiffs did not pretend to show what this alleged extra work or materials consisted of, but satisfied themselves with giving the mere conclusion that the alleged extras and contract price together amounted to the sum of \$79,096.55. A witness cannot be permitted to give his conclusion in answer to a question embracing the merits of a

case. The questions propounded to the witnesses regarding the performance of the contract involved the precise question to be determined by the jury, and was an invasion of the province of that body. (*Conner v. Stanley*, 67 Cal. 315, 7 Pac. 723; *Pelamourges v. Clark*, 9 Iowa, 1; *Bugbee Land Co. v. Brento* (Tex. Civ. App.), 31 S. W. 695; *Smuggler Mining Co. v. Broderick*, 25 Colo. 16, 71 Am. St. Rep. 106, 53 Pac. 169; *Combs v. Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; *Clarke v. Case*, 144 Mich. 148, 107 N. W. 893.) The witness should have stated the facts and permitted the jury to have drawn the conclusions. (*Brown v. Cloud Co. Bank*, 2 Kan. App. 352, 42 Pac. 593; *Teerpenning v. Corn Exchange Co.*, 43 N. Y. 281.) This court has upheld and enforced the foregoing doctrine in many cases. (*Hamilton v. Monidah Trust*, 39 Mont. 269, 102 Pac. 335; *Howie v. California Brewery*, 35 Mont. 264, 88 Pac. 1007; *Metz v. City of Butte*, 27 Mont. 506, 71 Pac. 761.)

The refusal of the court to permit the jury to view the premises was an abuse of discretion. It seems to be the opinion of the ablest courts of the country that such view should be granted the jury in cases where the evidence is contradictory and a mere view of the premises would put the jury in a position of deciding the issues fairly and accurately. (*Ormund v. Granite Mt. Co.*, 11 Mont. 303, 28 Pac. 289; *Smith v. Morse*, 148 Mass. 407, 19 N. E. 393; *Washburn v. Milwaukee Co.*, 59 Wis. 364, 18 N. W. 328; *Denver Co. v. Pulaski Co.*, 11 Colo. App. 41, 52 Pac. 226; *In re Parcel of Westervelt*, 58 Hun, 611, 12 N. Y. Supp. 859; *Weiant v. Rockland Lake Co.*, 61 App. Div. 383, 70 N. Y. Supp. 718.)

In behalf of Respondents, *Mr. F. B. Reynolds* submitted a brief and argued the cause orally.

Under the facts of this case plaintiffs were excused from producing the architects' certificate of the completion of the building. We contend that the reason given by the architects for the refusal of the certificate was capricious, unreasonable and arbitrary in so far as the plaintiffs were concerned; that the plain-

tiffs were prevented from procuring such certificate by causes over which they had no control whatever, and that they are thereby excused from securing it. This court has recognized many different reasons as sufficient to excuse the nonproduction of the architects' certificate. Among these are mentioned bad faith, oppression, injustice, dishonesty, arbitrariness, unreasonableness and improper refusal. (*Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280.) In a later case the rule respecting the issue involved in this case was laid down as follows: "The complaint must state that such certificate was given or demanded, and if refused, the reasons why it should have been given, or if waived, a statement of that fact." (*McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 428.)

The complaint and proofs in this case come within the rule above enunciated. (See, also, 6 Cyc. 89; 13 Current Law, 560; *Bannon v. Jackson*, 121 Tenn. 381, 130 Am. St. Rep. 778, 117 S. W. 504, 17 Ann. Cas. 77; *Neagle v. Herbert*, 73 Ill. App. 17; *McConologue v. Larkins*, 32 Misc. Rep. 166, 66 N. Y. Supp. 188; *Dyer v. Middle-Kittitas Irr. Dist.*, 25 Wash. 80, 64 Pac. 1009; *Windham v. Telephone Co.*, 35 Wash. 166, 76 Pac. 936; *Halsey v. Waukesha Springs Co.*, 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94.)

Plaintiffs also contend that there was a waiver of the certificate by the defendants in several different ways. It was waived by making payment upon the final installment after the completion of the work without requiring a certificate (*Blethen v. Blake*, 44 Cal. 117; *Hunn v. Pennsylvania Institution etc.*, 221 Pa. 403, 70 Atl. 812, 18 L. R. A., n. s., 1248; *Byrne v. Sisters etc.*, 45 N. J. L. 213); by at that time promising to pay the balance without making the production of the certificate a condition precedent thereto; by discharging the architects before the settlement was concluded (*Diehl v. Schmalacker*, 30 Misc. Rep. 786, 62 N. Y. Supp. 1080); by refusing payment of the balance due on other grounds than the failure to produce such certificate (*Ashland Lime Salt & Cement Co. v. Shores*, 105 Wis. 122, 81 N. W. 136; *Tilden v. Buffalo Office Building*, 27 App. Div. 510, 50 N. Y. Supp. 511; *McInnis v. Buchanan*, 53 Or. 533, 99 Pac.

929); and by not pleading in their answers the failure of plaintiffs to procure such certificate as a defense to the action. (*Healey v. Fallon*, 69 Conn. 228, 37 Atl. 495; see, also, 30 Am. & Eng. Ency. of Law, 2d ed., 1246; *Haden v. Coleman*, 73 N. Y. 567; *Abramson-Engesser Co. v. McCafferty*, 86 N. Y. Supp. 185; *Ashland Lime Salt & Cement Co. v. Shores*, 105 Wis. 122, 81 N. W. 136; *Lunsford v. Wren*, 64 W. Va. 458, 63 S. E. 308; *Fuchs v. Saladino*, 133 App. Div. 710, 118 N. Y. Supp. 172.)

The weight of the evidence is to the effect that the contractor fulfilled his part in erecting a building as required by the specifications, and after they had done that they had fulfilled all their obligations. Where a contract for the erection of a building prescribes that it shall be done according to certain specifications, the contractor is not accountable for unsatisfactory results, providing he has complied with the specifications. (*Cannon v. Hunt*, 116 Ga. 452, 42 S. E. 734; *Harlow v. Borough of Homestead*, 194 Pa. 57, 45 Atl. 87; *McKnight-Flintick Stone Co. v. Mayor of New York*, 160 N. Y. 72, 54 N. E. 661.)

It has been held that questions whether or not certain work was constructed in accordance with the contract and specifications are admissible on the ground that the same do not call for conclusions, but for a statement of fact. (*Taulbee v. Moore*, 106 Ky. 749, 51 S. W. 564; *Stark Grain Co. v. Harry Bros. Co.* (Tex. Civ. App.), 122 S. W. 947; *McKarsie v. Citizens' Bldg. & Loan Assn.* (Tenn. Ch.), 53 S. W. 1007; *New York C. I. C. v. U. S. Radiator Co.*, 174 N. Y. 331, 66 N. E. 967; *Bellows v. Crane Lumber Co.*, 119 Mich. 424, 78 N. W. 536.)

The rule that the architect is the agent of the owner of the building and that his act is an act of the owner is sustained by the following cases: *Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242; *Fransen v. Regents*, 133 Fed. 24, 66 C. C. A. 174; *Teakle v. Moore*, 131 Mich. 427, 91 N. W. 636; *Halsey v. Waukesha Springs Sanitarium, supra*.

MR. JUSTICE SMITH delivered the opinion of the court.

This action was begun in Park county to recover the sum of \$1,694.37, balance alleged to be due for material furnished and

labor performed upon the Hunters Hot Springs hotel and natatorium, under a written contract with the defendant Murray, acting as agent for the defendant, The Monida Trust, a corporation. The cause was tried to the district court, sitting with a jury. A verdict for \$1,200 was rendered in favor of the plaintiffs. From a judgment in the amount of the verdict and an order denying a new trial, the defendants have appealed.

The complaint, after setting forth the contract showing that "payments shall be made only upon certificate of the architects," alleges that "plaintiffs have furnished all the materials and performed all the labor mentioned in said contract to be by them furnished and performed in accordance with the terms thereof, and have in every respect faithfully performed all the conditions of said contract on their part, and all of said work was completed on the 3d day of August, 1909." It is then further alleged that the sum of \$1,694.37 remains due and unpaid, and "that plaintiffs have not secured the certificate of the architects authorizing the final payment upon said contract as required by the terms thereof, but have made repeated demands upon them for such certificate, and said architects have refused the same, not because of any fault of plaintiffs, but for the reason that defendant Murray has started suit against them, has made payments to plaintiffs without their certificates and without their knowledge, and has practically taken the matter out of their hands."

1. It is contended that the complaint does not state facts sufficient to constitute a cause of action, for the reason "that it was necessary for plaintiffs to allege and prove the issuance of the certificate, or show that it was waived by defendants, or withheld by collusion between the architects and the defendants, or [1] fraud of the architects." We think, however, that the complaint sufficiently shows that the certificate was withheld arbitrarily, or at least for some cause over which the contractors had no control, and such showing is all that is necessary. (*Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280; *McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 428; 6 Cyc. 88; *Windham v. Independent Tel. Co.*, 35 Wash. 166, 76 Pac. 936; *Halsey v.*

Waukesha Springs Sanitarium, 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94; *Dyer v. Irr. Dist.*, 25 Wash. 80, 64 Pac. 1009; *McConologue v. Larkins*, 32 Misc. Rep. 166, 66 N. Y. Supp. 188; *Neagle v. Herbert*, 73 Ill. App. 17; *Bannon v. Jackson*, 121 Tenn. 381, 130 Am. St. Rep. 778, 117 S. W. 504; *Michaelis v. Wolf*, 136 Ill. 68, 26 N. E. 384; *Schmidt v. City of North Yakima*, 12 Wash. 121, 40 Pac. 790; *Bentley v. Davidson*, 74 Wis. 420, 43 N. W. 139; *Byrne v. Sisters of Charity*, 45 N. J. L. 213.)

2. Contention is made that the evidence is insufficient to sustain the verdict: First, as we understand it, because plaintiffs failed to show a substantial compliance with the terms of the contract on their part; and, second, because the competent evidence in the record, as distinguished from that which is incompetent and irrelevant, discloses the fact that they have been fully paid. First. We think the court properly submitted to the jury the question whether plaintiffs' part of the contract was substantially performed. Second. We agree with appellants on this point. It is alleged in the complaint that the contract price was \$70,000, upon which the sum of \$68,305.63 has been paid, leaving a balance due of \$1,694.37. There is no word of extras in the pleading. The record shows that appellants have paid the sum of \$77,402.18 on the contract. To offset this apparent over-payment of \$7,402.18, plaintiffs undertook to show that they furnished extra work and material to the amount of \$9,096.55, and had applied to the payment of this sum certain of the moneys paid by appellants under the contract. Under the head of "extra work," the specifications attached to the contract provided: "The owner reserves the right to make any changes whatever, either in the quality or quantity of the work or materials that he may think fit, and the value of the said change or changes, either more or less, must be added to or deducted from the face of the contract. Nothing shall be considered an extra, unless it is agreed upon in writing before said extra work is done, and signed by the owner and contractor and certified to by the architects; and nothing shall be considered as extra work unless consequent upon some specific change in the plans or specifications. No change in the plans or these specifications can be made with-

out the written order of the architects with the approval of the owner."

In the case of *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280, this court quoted with approval excerpts from the following cases: *Russell v. Da Bandeira*, 13 Com. B., N. S., 149, and *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635. The doctrine laid down in those cases is that, where the contract provides that [2] no extra charges shall be made unless there shall be an order in writing fixing the price, there can be no charge for extra work, no matter what it may be, whether alterations in the plan or mode of doing the work, or additions or improvements in and about the completion of the building, ship, or other structure, unless the order or certificate has first been made. Mr. Chief Justice Blake, in writing the opinion of this court, said: "The contrary rule is a dangerous standard, and impairs the value, and renders uncertain every written contract for the construction of an edifice."

At the trial of this case the following proceedings took place while Mr. W. E. Piper, one of the plaintiffs, was a witness: Direct examination: "Q. In building this hotel building were there a number of extras, or not? (Objected to as immaterial and irrelevant under the pleadings. Objection overruled, and exception noted.) Q. Was there considerable extra work done on the work on this building? A. There was. Q. Can you state the amounts the extra work came to? Defendants' Counsel: The contract already in evidence provides as to the extra work and what shall be considered extra work. Nothing considered extra work unless it is agreed upon in writing. Q. Mr. Piper, were certain extras ordered by the architects in the progress of the work? (Objected to as incompetent; the contract calls for orders to be in writing. Objection overruled. Exception noted.) A. There were. Q. Were such agreements for extras made in writing? A. They were. Q. And were the prices for such extras agreed upon? (The defendants ask that the writing be produced as the best evidence.) Q. The extras were agreed upon in writing, were they? A. Yes, sir. (Objected to as incompetent.) Court: It is proper to state if they were; as to

what they were, the writing is the best evidence. Q. Mr. Piper, can you state the total amount that was agreed upon between you and the architects and Mr. Murray that would be paid for the extra work? (Objected to as immaterial and incompetent under the pleadings; the contract required such matter to be determined in writing. Overruled. Exception.) A. The extras amounted to \$9,096.55. (Objected to as calling for a conclusion of the witness. Overruled. Exception.) Q. What, then, was the total amount due your firm for work on the hotel building, for extras and the contract which was originally made? (Objected to as calling for a conclusion of the witness. Overruled. Exception.) A. \$79,096.55."

It will be noted that the plaintiffs were thus allowed to testify, not only that the plans and specifications were changed, but that extra work to the amount of over \$9,000 was performed, and this without producing any written order or certificate as a basis for either claim. Under the terms of the contract, "nothing was to be considered an extra unless agreed upon in writing." No writing was produced, and in its absence the presumption was that there were no extras. Counsel for respondents say in their brief: "The fact is, however, that plaintiffs did not attempt to prove what the extra work was nor the contents of any written instrument." But this argument is fallacious. They were, in fact, allowed to testify that they had performed extra work, without producing the only evidence which would prove, under the terms of the contract, that such work was extra work, to-wit, a written agreement or certificate. This, in effect, was proving the contents of a writing by parol. It will not do to say that they proved that there was such a writing, and therefore they were not obliged to produce it. Being in existence, it was the only evidence of their right to charge for extras, and the mere fact of its existence, or rather that the witness was willing to testify that it existed, did not absolve them from the duty of actually producing it, to the end that the court might judge whether it was such an agreement or order as would justify a charge for extras. So long as it was not produced, it had no efficacy whatsoever. The effect of the ad-

mission of this testimony was that plaintiffs, by indirection, were permitted to modify the terms of the only contract mentioned in their complaint, a contract which was therein alleged to be in writing. No attempt was made, either by pleading or proof, to show a modification or waiver of the terms of this contract; and it will be noted that Mr. Piper did not testify that Murray had agreed, even orally, to pay them for extra work. The indirect effect of this testimony was to place upon the appellants [5] the burden of proving that respondents had no right or authority to make an application of payments, when in fact and in law the burden was on them to prove that they had such right.

3. At the beginning of the testimony of the plaintiff E. F. Piper, he was allowed to testify, over objection, that plaintiffs had constructed the building, furnished the materials, and performed the work in general conformity with the plans and specifications. We think the testimony was unobjectionable. The witness had already testified that he had had twenty-two years' experience as a builder, and that he was "on the job most of the time," although he had made trips to Billings. He was not, however, able to say of his own knowledge that every detail of the contract had been carried out in strict conformity with its terms. The question was simply preliminary. In trying a case of this nature, some foundation must be laid for showing a right of action on the part of the plaintiff. It will not do to take up the time of the court by inquiry, in the first instance, as to every detail. Liberal opportunity for cross-examination should, of course, be allowed, and if, upon inquiry as to particular portions of the work, it develops that the contract has in fact been breached, the court and jury will readily note the fact. We see no objection, in a case like this, to allowing a plaintiff who is an [6] expert and generally conversant with the details of the work, to testify that it has been performed in substantial conformity with the plans and specifications attached to the contract.

4. If we assume that the plaintiffs performed their part of the contract in substantial compliance with its terms (a question of

fact which was properly submitted to the jury), we think the testimony sufficiently shows that the architects acted arbitrarily in withholding a final certificate, or, at any rate, that it was not withheld because of any fault of the plaintiffs.

5. One Otto Stoelker, an expert in concrete work, testified as to certain cracks in the concrete upon the building. He was asked by defendants' counsel, on cross-examination, "Where [7] would you place the blame in the cracking of the cement work?" The court properly sustained an objection to this question, and also to the following, "Whose duty is it to provide for expansion and contraction?"

6. The witness E. F. Piper testified for the plaintiffs that he knew that the sand used was the best quality the locality afforded, because a man told him so. This, of course, was hearsay; but the motion to strike it out was somewhat trivial.

7. While it was proper to allow Piper to testify in answer to a preliminary question, and in view of his general acquaintance with the work, that all of the specifications of the contract were substantially carried out, it was not error to refuse to allow the defendants' witness Brookman to answer this question, "In your opinion as a practical builder, Mr. Brookman, state whether or not the contractors were entitled to receive, or the architects in charge entitled to give, a final certificate of this work, according to the plans and specifications." Brookman had inspected [8] the building on the day before he was called as a witness, and had testified to what he claimed were certain defects in its construction. The court was correct in not allowing him to substitute his judgment in place of that of the architects or the jury, as to whether plaintiffs were entitled to a certificate entitling them to final payment.

8. It is contended that the court erred in admitting a certain Exhibit "G" in evidence, over defendants' objection, being a letter from Link & Haire, the architects, to the Piper Construction Company. If the letter shows anything, it is that plaintiffs had not completed their contract at the time it was written; but,

in so far as their case is concerned, we think it not only irrelevant, but many portions of it are incompetent.

9. The matter of allowing the jury to inspect the hotel, [9] many months after its alleged completion, was within the sound legal discretion of the trial court, and we find no abuse of that discretion.

10. It is contended that the court erred in giving the following instruction: "(3) You are instructed that, although the contract in question in this case provides that payments shall be made to plaintiffs only upon the architects' certificate, yet if you find that defendant, The Monida Trust, has made payments to plaintiffs without requiring the production of such certificates, then such requirement has been waived by said defendant, and the failure to procure such certificate is not a bar to this action." [10] We think this instruction should not have been given. The complaint is not framed on the theory that the final certificate was waived. Article 10 of the contract expressly provides that "no certificate given or payment made, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and no payment shall be construed to be an acceptance of defective work or improper materials."

11. We think instructions Nos. 4 and 5, of which complaint [11] is made, correctly interpret the contract, and the law relating thereto, when read in connection with the other instructions.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied May 11, 1911.

NEW YORK LIFE INSURANCE CO., APPELLANT, *v.* DEER LODGE COUNTY, RESPONDENT.

(No. 2,991.)

(Submitted April 8, 1911. Decided April 25, 1911.)

[115 Pac. 911.]

Interstate Commerce—Life Insurance—Taxation—Constitution.

Interstate Commerce—Insurance Companies—Excess of Premiums Over Losses—Taxation.

1. Revised Codes, section 4073, providing that every insurance company transacting business in the state must be taxed upon the excess of premiums over losses and ordinary expenses within the state during the previous year, applies only to business transacted within the state, and is not objectionable as an interference with interstate commerce.

Same—Subjects of Regulation—Insurance.

2. The business of life insurance conducted in the state by a foreign corporation under a certificate of authority from the state, collecting premiums and paying losses on policies and making loans to policy-holders on the security of their policies, is not "commerce" within section 8, Article I, United States Constitution.

Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.

ACTION by the New York Life Insurance Company against Deer Lodge County. Judgment for defendant, and plaintiff appeals. Affirmed.

Mr. James H. McIntosh, and Mr. R. L. Clinton, for Appellant, submitted a brief. Mr. Clinton argued the cause orally.

The transaction of the business of life insurance in the manner described in the appellant's complaint is interstate commerce. What interstate commerce is has been a subject prolific of discussion and dispute. In the leading case of *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. Ed. 23, Mr. Chief Justice Marshall said: "Commerce, undoubtedly, is traffic, but it is something more—it is intercourse." In its largest sense, it consists of interstate intercourse and traffic in all their forms. It embraces all contracts of purchase, sale or exchange of property to be transported among the several states, and the articles bought, sold or exchanged for the purpose of such transit,

as well as the interstate transportation and transit of persons and property, and the agencies employed therein. (*Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 63 L. Ed. 23; *The Daniel Ball*, 10 Wall. (U. S.) 557, 19 L. Ed. 999; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; *United States v. Knight & Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325.) The power to regulate commerce is the power to prescribe the rules by which commerce shall be governed. It presupposes the existence of commerce. It is a power "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." (*Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 63 L. Ed. 23; *United States v. Knight & Co.*, *supra*.) It includes every regulation that directly and immediately, but not indirectly or remotely, affects interstate intercourse and traffic, whether the regulation affects the contract of purchase, sale or exchange of property to be transported among the states, or the articles bought, sold or exchanged for the purpose of such transit, or the interstate transportation and transit of persons and property, and the agencies employed therein. (*Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547; *Kidd v. Pearson*, 128 U. S. 23, 9 Sup. Ct. 6, 32 L. Ed. 346; *Nashville Ry. Co. v. Alabama*, 128 U. S. 101, 9 Sup. Ct. 28, 32 L. Ed. 352; *New York, N. H. & H. R. R. v. New York*, 165 U. S. 631, 17 Sup. Ct. 418, 41 L. Ed. 853; *M., K. & T. Ry. v. Haber*, 169 U. S. 630, 18 Sup. Ct. 488, 42 L. Ed. 878; *Hopkins v. United States*, 171 U. S. 594, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. United States*, 171 U. S. 618, 19 Sup. Ct. 50, 43 L. Ed. 300; *Lake Shore & M. Co. v. Ohio*, 173 U. S. 298, 19 Sup. Ct. 465, 43 L. Ed. 702.)

The tax in question is a burden upon interstate commerce, and is therefore void. It is claimed to be a privilege or franchise tax. The state has no power to impose a tax or burden upon the privilege of doing the business of interstate commerce. (*Northwestern Mutual Life Co. v. Lewis and Clark County*, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982.) Interstate commerce cannot be taxed

at all, even although the same amount of tax should be laid on domestic business of the same kind or class. (*Robbins v. Shelby County*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Norfolk etc. Ry. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; *Corson v. Maryland*, 120 U. S. 502, 7 Sup. Ct. 655, 30 L. Ed. 699; *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; *Clyde Steamship Co. v. Charleston*, 76 Fed. 46; *American Company v. North Carolina*, 43 Fed. 609, 11 L. R. A. 179.).

In behalf of Respondent, there was a brief by *Mr. Albert J. Galen*, and *Mr. J. A. Poore*. *Mr. Poore* argued the cause orally.

Section 4073, Revised Codes, being the section under which the tax complained of was levied, taxes only "The excess of premiums received over losses and ordinary expenses incurred within the state," and does not attempt in any manner to tax interstate commerce. But, in addition to this fact, the business of insurance is not "commerce" within the meaning of the federal Constitution providing that Congress shall have power "to regulate commerce with foreign nations and among the several states," and this has been decided by the supreme court of the United States in a number of cases. (See *Paul v. Virginia*, 8 Wall. (U. S.) 183, 19 L. Ed. 357.) This decision has been followed and upheld in numerous cases by that court, and the rule there announced has been held to apply to all kinds of insurance contracts. (*Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 19 L. Ed. 1029; *Ducat v. Chicago*, 10 Wall. 410, 19 L. Ed. 972; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; *Phila. Fire Assn. v. New York*, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342; *Nutting v. Massachusetts*, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324; *Western Union v. Kansas*, 216 U. S. 45, 30 Sup. Ct. 190, 54 L. Ed. 355.)

The state has the power to exclude foreign insurance companies altogether from its territory. It also has the power, if

it allows any such company to enter its confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of the possession of these powers, it has the right to enforce any conditions imposed by its laws as preliminary to the transaction of business within its confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent. (*Hooper v. California*, 155 U. S. 655, 15 Sup. Ct. 207, 39 L. Ed. 297; *Nutting v. Massachusetts*, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324; *Security National v. Prewitt*, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317.) And the state, having the power to exclude entirely, has the power of changing the conditions of admission at any time, for the future, and to impose as an addition the payment of a new tax, or a further tax, as a license fee. (*Philadelphia Fire Assn. v. New York*, 119 U. S. 119, 7 Sup. Ct. 108, 30 L. Ed. 342.) If the state has the power to exclude a foreign insurance company from engaging in business within its boundaries, and to provide rules and regulations under which it may be admitted, it certainly has the right to enforce these rules and regulations and to require it to bear the same burdens which may be imposed upon the home institutions of the state.

We have carefully read each of the decisions cited by appellant, and we are unable to find in any of them a statement of law that a foreign insurance company doing business in another state than that of its creation is engaged in interstate commerce, or that such insurance company could not be required to pay the license fees and taxes prescribed by such foreign state. All that any of the cases cited hold is that a state cannot tax interstate commerce, and determining in certain instances what interstate commerce is under the federal Constitu-

tion, but no case cited has any bearing upon the question as presented in the case at bar.

The identical question presented here was decided by this court in the case of *Northwestern Mutual Life Ins. Co. v. Lewis & Clark County*, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982.

MR. JUSTICE SMITH delivered the opinion of the court.

The plaintiff is a life insurance company, incorporated under the laws of the state of New York, doing a general life insurance business in every country of the civilized world, including all of the states, territories, and possessions of the United States. During the year 1909 it received from policy-holders residing in Deer Lodge county in this state premiums aggregating the sum of \$14,233.41. The insurance losses sustained and the ordinary expenses incurred, in the county, during the year amounted to \$8,888.41; the excess of premiums over losses and ordinary expenses being the sum of \$5,345. In the year 1910 the county assessor of the county, claiming to act by virtue of section 4073, Revised Codes, placed the plaintiff's name on the assessment-roll as the owner of personal property in the said sum of \$5,345, and thereupon the taxing authorities imposed a tax against it in the sum of \$209.79, based upon said excess of premiums over losses and ordinary expenses. This latter sum it paid under protest, and this action was brought to recover the same. It is alleged in the complaint that "all the business of the plaintiff now doing or hitherto done with the state, or with residents, citizens, or inhabitants thereof, * * * is interstate intercourse, and is commerce among the several states, within the meaning of that clause of section 8, Article I, of the Constitution of the United States, which invests the Congress with power to regulate commerce among the several states. * * * Said tax was and is illegal, unlawful, and void, for that said defendant was without jurisdiction to levy or collect said tax, and the levy and collection thereof was and is a burden upon interstate commerce." The district court

of Deer Lodge county sustained a general demurrer to the complaint, whereupon plaintiff refused to further plead, and judgment was entered in favor of the defendant. The appeal is from the judgment. Appellant's contention is that the tax was illegal and void, for the reasons set forth in the complaint.

Section 4073, Revised Codes, reads as follows: "Each and every insurance corporation or company transacting business in this state must be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state during the year previous to the year of listing in the county where the agent conducts the business, properly proportioned by the corporation or company at the same rate that all other personal property is taxed, and the agent shall render the list, and be personally liable for the tax; and if he refuse to render the list or to make affidavit that the same is correct, to the best of his knowledge and belief, the amount may be assessed according to the best knowledge and discretion of the assessor. Insurance companies and corporations are subject to no other taxation under the laws of this state, except taxes on real estate and the fees imposed by law."

Several paragraphs of the complaint are devoted to a narration of the manner in which the business of life insurance is carried on and transacted between the plaintiff and its policy-holders. Among others we find paragraph 5, which we quote: "Said several policies provide for advances or loans to the policy-holder on the pledge of the policy as security, and pursuant to said provision the plaintiff has outstanding advances or loans made to its policy-holders in said state aggregating the sum of, to-wit, \$432,878. For more than ten years last past the plaintiff has had outstanding advances or loans to policy-holders in said state aggregating a large sum. Said loans have each and all been made by the policy-holder transmitting to the home office of the plaintiff an application for the loan, which said application the plaintiff considered and acted upon at its home office, and, if it accepted it, the plaintiff made out at its home office a loan agreement which it forwarded by mail for execution, and, after executing it, the policy-holder forwarded

the loan agreement and the policy to the home office, and, on receipt thereof at its home office, the plaintiff forwarded the proceeds of the loan by mail to the policy-holder within said state by the plaintiff's check drawn to the policy-holder's order on its bank account in the city of New York. In this manner the plaintiff is continuously making advances to its policy-holders in Montana." Whether this and other paragraphs of the complaint were inserted in order to distinguish the case from that of *Northwestern Mutual Life Ins. Co. v. Lewis & Clark County*, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982, and other cases herein cited, we do not know. At the argument no suggestion to that effect was advanced, and we find nothing of it in the printed brief. We shall therefore assume that the plaintiff company is engaged in the same general line of business as was the plaintiff in *Northwestern Mutual Life Ins. Co. v. Lewis & Clark County*.

In *Paul v. Virginia*, 8 Wall. 168, 183, 19 L. Ed. 357, the supreme court of the United States, speaking through Mr. Justice Field, said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss (by fire), entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states." See, also, *Ducat v. Chicago*, 10 Wall. 410, 19 L. Ed. 972, *Philadelphia Fire Assn. v. New York*, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342, *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, *Nutting v. Massachusetts*, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324, and *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 45, 30 Sup. Ct.

190, 54 L. Ed. 355; also the case of *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 401, 20 Sup. Ct. 962, 967, 44 L. Ed. 1116, where the court again said, in a cause to which this appellant was a party: "The business of insurance is not commerce."

But the question here involved has been decided in this state in *Northwestern Mutual Life Ins. Co. v. Lewis and Clark [1] County, supra*, although it does not appear from the report of that decision that section 8, Article I, of the federal Constitution, was in terms invoked by the plaintiff. The court in that case said: "The legislature has the right to prescribe reasonable terms upon which foreign corporations may do business in this state. The character, kind, and amount of business done by the company, as well as the *situs* of its tangible property, may be considered in applying the various systems of taxation. The franchise of a corporation is granted by the jurisdiction where the company is incorporated, and its *situs* is in the state or country of its origin; but, before the company can do business in this state, it must comply with the terms of the statute relating thereto, and upon such compliance a certificate of authority is issued to it. It then stands under this law on the same footing with domestic companies, and is subject to the same taxation on the same class of property. This certificate of authority issued to a foreign insurance company confers upon such company a privilege or right not possessed or enjoyed by citizens generally, and not conferred upon it by its original franchise. This right or privilege so conferred is in that sense a franchise, and by it the company is authorized to establish, conduct, and maintain an insurance business, the value of which is ascertained in the manner prescribed by statute; that is, 'the excess of premiums over losses and ordinary expenses incurred.' It applies only to business transacted within the state, and is not objectionable as interfering with interstate commerce."

We therefore hold that the life insurance business from which arose the excess of premiums over losses and ordinary expenses upon which the assessor of Deer Lodge county levied a tax is

[2] not interstate business, and is not commerce within the meaning of section 8, Article I, of the federal Constitution.

The judgment is affirmed.

Affirmed.

MR. JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Appeal taken to supreme court of the United States, June 17, 1911.

BILLINGS REALTY CO., RESPONDENT, *v.* BIG DITCH CO.,
APPELLANT.

(No. 2,974.)

(Submitted April 7, 1911. Decided April 29, 1911.)

[115 Pac. 828.]

Waters—Irrigation Canals—Careless Management—Injuries to Land—Liability—Principal and Agent—Corporations and Stockholders—Complaint—Sufficiency—Waiver—Instructions—Review—Findings.

Irrigation Canals—Injuries to Land—Description of Premises—Complaint—Sufficiency.

1. As against a general demurrer or objection to the introduction of evidence, a complaint seeking damages occasioned by the overflow of water from an irrigating canal, which described the land upon which the trespass was alleged to have been committed, as the north half of the northwest quarter of a certain section in a designated township, "with the exception of twenty-nine acres" theretofore sold, was sufficiently specific to identify the premises.

Complaint—Indefiniteness—Waiver.

2. An objection to a complaint on the ground of indefiniteness is waived unless a special demurrer on that account is interposed.

Corporation—Proof of Corporate Existence—Statutes.

3. Chapter 94, Laws of 1909, providing that the certificate of incorporation of companies issued by the secretary of state shall be *prima facie* evidence of their corporate character and capacity, held not to apply to corporations organized before the adoption of the Codes of 1895, prior to which time provision for such certificate had not been made.

Irrigation Canals—Negligence in Operation—Liability of Corporation—Negligence of Agents—Presumptions.

4. A corporation organized to furnish water to its stockholders for irrigation and domestic purposes was not an insurer and could be held liable in damages only for negligence of its agents—not for that of

trespassers—which negligence will not be presumed, but must be pleaded and proved.

Same—Negligence of Stockholders—Agency—Evidence—Liability of Corporation.

5. Evidence held to show that defendant company had constituted its stockholders its agents in the management of its canal, by permitting them, whenever they wanted water on their premises, to so manipulate the headgate as to cause the water to run in the desired direction; held, further, that therefore the company was liable for any damage through flooding occasioned by their negligence in thus taking water from the canal.

Instructions—Refusal—Settlement—Objection and Exception—Statutory Provisions.

6. The provision of section 6748, Revised Codes, that at the settlement of the instructions the particular grounds of objection or exception to those deemed erroneous shall be stated, else a motion for a new trial shall not be granted nor a cause reversed by the supreme court for errors in them, applies only to instructions given and not to those refused.

Same—When Refusal not Error.

7. It is not error to refuse a correct instruction where other appropriate instructions upon the same subject have been given.

Corporations—Stockholders—Agency—Instructions.

8. Whether a stockholder is or is not the agent of the corporation depends upon the facts of the particular case; therefore the refusal of an unqualified instruction that he is not such agent was properly refused.

Findings—Duty of District Court to Make.

9. Under section 6763, Revised Codes, the district court in an equity case is required to make findings, whether requested to do so or not.

Appeal from District Court, Yellowstone County; Frank Henry, Judge of the Sixth Judicial District, presiding.

ACTION by the Billings Realty Company against the Big Ditch Company. From a judgment for plaintiff and an order denying it a new trial, defendant appeals. Affirmed.

Mr. F. B. Reynolds submitted a brief and reply brief in behalf of Appellant, and argued the cause orally.

The complaint in this case fails to state a cause of action, for the reason that it does not describe the property which it is alleged was damaged. The property involved in an action should be sufficiently described for identification. (6 Ency. Pl. & Pr. 259; *People v. Mariposa Co.*, 31 Cal. 196; *People v. Pico*, 20 Cal. 596; *Atwood v. Atwood*, 22 Pick. (Mass.) 283; *White v. Hapeman*, 43 Mich. 267, 38 Am. St. Rep. 178, 5 N. W. 313.)

Not a particle of evidence was introduced in plaintiff's case showing any negligence on the part of defendant. Defendant is not liable for damages from the overflow of its ditch unless such overflow occurs through negligence. (Wiel on Water Rights, sec. 163; Long on Irrigation, sec. 69; 3 Farnham on Waters and Water Rights, sec. 634; 17 Ency. of Law, 2d ed., 512; 1 Thompson on Negligence, sec. 706; *Fleming v. Lockwood*, 36 Mont. 384, 122 Am. St. Rep. 375, 92 Pac. 962, 14 L. R. A., n. s., 628, 13 Ann. Cas. 263; *King v. Miles City Irr. Ditch Co.*, 16 Mont. 463, 50 Am. St. Rep. 506, 41 Pac. 431; *Lisonbee v. Monroe Irr. Co.*, 18 Utah, 343, 72 Am. St. Rep. 784, 54 Pac. 1009.)

Negligence cannot be presumed, but must be proven. It cannot be assumed that the ditch owner has been guilty of negligence because of the fact that damage has resulted from the operation of the ditch, but such negligence must be proven. (Long on Irrigation, sec. 68; Wiel on Water Rights, sec. 163; *Greeley Irr. Co. v. House*, 14 Colo. 549, 24 Pac. 329; *Fleming v. Lockwood*, 36 Mont. 384, 122 Am. St. Rep. 375, 92 Pac. 962, 14 L. R. A., n. s., 628, 13 Ann. Cas. 263; *Tenney v. Miners' Ditch Co.*, 7 Cal. 335, 11 Morr. Min. Rep. 31.)

Plaintiff having failed to prove negligence, the court should have granted motion of defendant for direction of verdict.

Defendant ditch company cannot be held to be an insurer against the overflow of its ditch and consequent damage to the plaintiff. (Long on Irrigation, sec. 69; 3 Farnham on Waters and Water Rights, 634; *King v. Miles City I. D. Co.*, 16 Mont. 463, 50 Am. St. Rep. 506, 41 Pac. 431; *Fleming v. Lockwood*, 36 Mont. 384, 122 Am. St. Rep. 375, 92 Pac. 962, 14 L. R. A., n. s., 628, 13 Ann. Cas. 263.)

Ditch companies are required to anticipate and prepare to meet only such emergencies as may reasonably be expected to arise. (Long on Irrigation, sec. 169; Wiel on Water Rights, sec. 164; 3 Farnham on Waters and Water Rights, 634; *Lisonbee v. Monroe Irr. Co.*, *supra*.)

The evidence in the case conclusively shows that the defendant did not, through any of its officers or employees, turn the water into the ditch in question. As the water was turned in

by someone, then, by the process of elimination, it must have been either by a stockholder or by a trespasser. Therefore, if defendant is to be held liable in this action, it must be on the theory that a ditch company is liable for the negligence either of a stockholder or of a trespasser. That the company could not be held liable for the acts of a trespasser, see 1 Thompson on Negligence, sec. 701, citing *Box v. Jubb*, 4 Ex. Div. 76. Nor can it be held liable for the negligent acts of a stockholder in irrigating his land. (3 Farnham on Waters and Water Rights, 1992.) The company is simply the agent to deliver the water to the headgate from which the stockholder takes his water; there such agency ceases. Up to that point the company is in a sense a common carrier, and after delivery of the water to the headgate, it is no more responsible for the water so delivered than is a railroad company after delivery of freight to the shipper. (*Farmers' High Line Canal etc. Co. v. White*, 32 Colo. 114, 75 Pac. 415; *Wyatt v. Larimer & Weld I. Co.*, 18 Colo. 283, 298, 36 Am. St. Rep. 280, 33 Pac. 144; Long on Irrigation, sec. 126.)

In behalf of Respondent, *Mr. W. M. Johnston* and *Mr. H. J. Coleman* submitted a brief. *Mr. Johnston* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

About 1882 the Minnesota & Montana Land & Improvement Company constructed a large irrigation canal which tapped the Yellowstone river some twenty-five miles west of Billings, and, following a general easterly direction, terminated upon the land of the plaintiff. In 1900 the defendant succeeded to the ownership and control of the canal, and has since operated it for the purpose of furnishing water for irrigation and domestic uses. About November 1, 1908, a large quantity of water flowed through the canal and out over plaintiff's lands, carrying away the soil and injuring the premises. This action was commenced by plaintiff to recover damages in the sum of \$1,000, and to

secure an injunction restraining the defendant from permitting water to flow through the canal to the east terminus, until such time as ample means were employed to care for the surplus. It is alleged that the defendant company has been negligent in failing to equip its canal with wasteways or other means to care for or control the surplus water in the canal, and in failing to provide any means for caring for the water which flowed through the canal to the eastern terminus, and the result of such negligence was the injury to plaintiff's lands. The answer denies any negligence or any injury or damage to plaintiff's property. The trial upon the questions of negligence and damage resulted in a verdict and judgment in favor of plaintiff, and the trial court ordered an injunction in conformity with the prayer of the complaint. The defendant appealed from the judgment and from an order denying it a new trial.

1. In the complaint plaintiff's lands are described as "the north half of the northwest quarter of section thirty-two, in township one, north of range twenty-six east of the Montana Meridian, in Montana, with the exception of twenty-nine acres of said subdivision of land heretofore sold by plaintiff to third parties, but which said twenty-nine acres are in no way affected [1] by the washout and excavation hereinafter mentioned." It is now insisted that the complaint does not state a cause of action, for the reason that the land injured is not described sufficiently. It may be admitted that if the execution to be issued upon a judgment rendered in this action would operate directly upon the land in question, as, for instance, in the case of the sale of the land itself, or if it was sought to enforce a tax or other lien, the description herein given might not be sufficiently specific to enable the proper officer to identify it; but in an action for damages for trespass, where the property enters into the controversy only incidentally, much less particularity is required in describing it. All that the plaintiff is called upon to do is to inform the defendant, with reasonable certainty, of the location of the property upon which the trespass is alleged to have been committed, to the end that a defense may be made or a plea of former adjudication thereafter interposed, if another action

should be instituted for the same injury. There was not any special demurrer or motion to make more specific interposed, and as against a general demurrer or objection to the introduction of evidence this complaint sufficiently meets the requirements of the rule. (*Gulf Ry. Co. v. Jagoe* (Tex. Civ. App.), 32 S. W. 1061; *Lake v. Loysen*, 66 Wis. 424, 29 N. W. 214; 21 Ency. Pl. & Pr. 818.) If it be assumed that the complaint is indefinite in [2] the description of the land involved, an objection to it on that account must be made by special demurrer, or it is deemed waived. (Rev. Codes, sec. 6539.)

2. The corporate existence of the plaintiff was put in issue by the pleadings, and upon the trial plaintiff offered, in evidence of such corporate existence, the original articles of incorporation on file in the office of the county clerk of Yellowstone county, and a certified copy thereof from the office of the secretary of state. Objection was made to the offered evidence, but the objection was overruled, and it is insisted that the legislature has provided the method for proving corporate existence, and that such method must be deemed to be exclusive. The legislation to which reference is made is Chapter 94, Laws [3] of 1909. This chapter provides that the certificate of incorporation issued by the secretary of state shall be admitted, and shall be *prima facie* evidence of the corporate character and capacity of the corporation and of its right to transact business. The chapter contains a general repealing clause. The evidence discloses that this plaintiff corporation was organized in 1891 for the term of twenty years. Prior to the adoption of the Codes of 1895, our corporation laws were contained in the Compiled Statutes of 1887, and amendments thereto, found in the legislative Acts of 1893. Prior to 1895, there was not any provision of law for the issuance of certificates of incorporation, and, as a matter of fact, such a certificate was never issued prior to July 1 of that year. Neither is there any provision for the issuance of a certificate, since 1895, to a corporation formed prior thereto. Section 447, Fifth Division, Compiled Statutes of 1887, provides that proof of corporate existence shall be made by the production of a certified copy of the articles of incorporation.

from the office of the secretary of state. If the provisions of Chapter 94 above be held to declare the only rule of evidence in a case of this character to which a corporation is a party, then as to every corporation organized prior to 1895 there cannot be any proof of corporate existence, which is tantamount to denying such corporations access to our courts. But manifestly Chapter 94 above cannot refer to a corporation organized prior to July 1, 1895; for by its terms it applies only to corporations to which certificates of incorporation have been issued, or, what is the same thing, to corporations organized since the adoption of the Codes. The ruling of the trial court was correct.

3. Defendant moved for a directed verdict, but the motion was overruled. It is insisted that there is not any evidence of [4] negligence on the part of the defendant corporation. The defendant company was not an insurer and could be held liable only for negligence, and its negligence will not be presumed, but must be pleaded and proved. (*Fleming v. Lockwood*, 36 Mont. 384, 122 Am. St. Rep. 375, 92 Pac. 962, 14 L. R. A., n. s., 628.) Unless the record furnishes some substantial evidence of negligence, the judgment cannot stand.

As indicated above, when the canal was first constructed, its eastern terminus was on plaintiff's property. Witnesses for the defendant testified that in 1900, after the canal was taken over by the present owners, the eastern terminus was changed to a point about a quarter of a mile west, permitted to remain there for some two years, and then again changed to a point about half a mile farther west and near the south quarter corner of section 30, where a dam was thrown across the canal, with a headgate in it, and a spillway placed in the canal to permit the surplus water to flow out down a flume and into a ravine; that this condition has prevailed since; that since constructing the spillway the defendant company has not used that portion of the canal from that point eastward, but it has been used by individual stockholders and water users as a lateral; that there are four or five stockholders who use the water [5] from the canal at points east of the spillway; that it has

always been the custom for water users to turn the water from the canal into their laterals, and for those who used water east of the spillway to turn the water down the old canal at that point; the company merely exercising supervision, to the end that no more water should be taken by any individual user than the amount to which he was entitled.

The contention of appellant is, that having abandoned the eastern portion of the canal, it is not liable for damages arising from the negligent mismanagement of the canal eastward from the spillway, and, since the injury complained of resulted from the flow of water through this eastern section, liability therefor cannot attach to defendant, unless it was negligent in causing or permitting such flow. It appears from the evidence without contradiction that sometime in September the water was turned off at the head of the canal, but later was turned in again by the defendant company to supply domestic needs of some stockholders who had the right to the use of the water at that time. It appears also that from the spillway eastward the canal is filled somewhat with silt, and in order to get water through that portion it is necessary to place flash-boards in the spillway to raise the water and force it eastward; that, if left entirely open, the spillway will ordinarily discharge the full capacity of the canal. On the part of the plaintiff, the evidence tends to show that stockholders were using the water through the canal east of the spillway immediately prior to the overflow complained of; that the headgate in the canal at the spillway was so far defective that it did not regulate or control the water in the canal; but if flash-boards were in the spillway the water would flow eastward whether this headgate was open or closed. While there is not any direct evidence of the fact, it is fairly inferable from the record that the water which caused the injury to plaintiff's premises was turned down from the spillway by some stockholder who was entitled to use it, and who, in order to accomplish this purpose, must have placed the flash-boards in the spillway. It appears that some two or three weeks before the accident the defendant company's ditch superintendent had taken the flash-boards out of the spillway and closed

the headgate; but it also appears that some of the stockholders were using water below the spillway after that time and immediately before the accident.

Touching the use of the canal below the spillway, the superintendent of the ditch company testified that it was used as a lateral. The president of the company testified that after the spillway was constructed the company did not use the canal below the spillway, but it was used as a lateral by those interested below. On cross-examination he testified that the defendant company put in the dam, headgate, and spillway; that "the stockholders had nothing to do with it. That is all the company ever did toward abandoning the ditch from that point to the stone quarry. The company did not enter into any agreement with the stockholders below the spillway in regard to taking over the ditch from that point to the stone quarry as a lateral." It appears that the stone quarry mentioned is at the point where the canal originally terminated at plaintiff's land. Other witnesses testified that there was not any appreciable change in the use of the canal below the spillway, after the spillway was constructed, from the use before that time. The defendant company did own the canal throughout its entire length. It has not done anything to devest itself of such ownership; and, while it might abandon a portion of the canal, it cannot thereby relieve itself of liability, if in fact it continued to use that portion. Whether it did continue to use such portion was a question of fact for the determination of the jury, and this fact having been resolved against the defendant, the question then arises: Was the defendant liable for damages resulting from a negligent misuse of this portion of the canal under the circumstances disclosed?

It will be conceded that the mere ownership of the canal does not carry with it liability for damages arising from its negligent misuse. It must be shown further that such negligent misuse was occasioned by the defendant. It would not be liable for the wrongful acts of a trespasser upon its property. The defendant, being a corporation, can act only through agents, and, in order to hold it liable in this instance, it must appear that

the wrongful act was committed by some one who was the agent of the defendant in turning in the water which caused the injury. As said above, we think there is sufficient evidence to show that the water was turned down the canal below the spillway by some stockholder who had a right to the use of the water at that time. It is not of moment now to consider or determine the precise relationship existing between a corporation organized to supply water for irrigation or domestic uses and its stockholders generally. The pleadings determine that this canal was owned exclusively by the defendant corporation, and for any negligent misuse by the defendant the corporation is liable.

The evidence discloses without contradiction that the headgate below the spillway was placed there by the defendant, and it might well be said that there is little, if any, contradiction in the evidence that the headgate was so far defective in its construction and operation as to be unfit for the uses it was intended to serve. It is also clear that the defendant had not made any provision for caring for surplus water which might reach the eastern terminus of the canal at plaintiff's land. On the contrary, the evidence shows that during the irrigation season of 1908 water flowing through the canal ran out the eastern terminus and over plaintiff's property for a considerable portion of time. The evidence is altogether uncontradicted that whenever a stockholder wanted water he went to the canal and turned it out, and that whenever a stockholder wanted water below the spillway he went to the spillway, placed the flash-boards in, opened the headgate, and helped himself, and that this custom was known to and approved by the defendant. Under these circumstances the ditch company cannot be heard to say that the act of a stockholder in turning down the water was authorized for all purposes beneficial to the stockholder, but unauthorized if, perchance, damage resulted from the act. The evidence seems to be ample to show that the defendant company had constituted its stockholders its agents in the management of its canal, to the extent that they were authorized

to change the conditions at the spillway and headgate, so that water would flow through the canal below that point.

We think the evidence sufficient to go to the jury, and that the motion for a directed verdict was properly denied.

4. Error is predicated upon the refusal of the trial court to give certain instructions requested by defendant. Counsel for respondent suggest that if the provisions of section 6746, Revised Codes, apply to offered instructions which are refused, in that the particular grounds of objection or exception shall be stated, then appellant is not in a position to urge these specifications of [6] error. It seems to us, however, that those provisions apply only to instructions given. The last paragraph of subdivision 5 of section 6746 reads as follows: "No motion for a new trial on the ground of errors in the instructions given shall be granted by the district court unless such errors were specifically pointed out and excepted to at the settlement of the instructions, as herein provided; and no cause shall be reversed by the supreme court for any error in instructions, which was not specifically pointed out and excepted to at the settlement of the instructions as herein specified, and such error and exception incorporated in and settled in the bill of exceptions or statement of the case as herein provided." When a party offers an instruction and the court refuses to give it, there would seem to be nothing further for him to do but to take his exception and have it settled in a bill of exceptions, or statement of the case.

The court refused the defendant's offered instruction No. 4, to the effect that defendant is not an insurer, but liable only for its negligence. The instruction correctly states the law; but the subject was thoroughly covered by other instructions, particularly by 5 and 7 given, in which the court emphasized to the jury the fact that the defendant could be held liable for injury only upon proof of negligence. It is not error to refuse [7] an instruction, even though it correctly states the law, if other appropriate instructions upon the same subject have been given. (*Townsend v. City of Butte*, 41 Mont. 410, 109 Pac.

969.) To multiply instructions only confuses the jury. For the same reason instruction No. 7, offered, was properly refused.

Instruction No. 6, offered and refused, appears to us not to be applicable to the facts disclosed by this record. The defendant did not discharge its liability altogether by arranging its headgate and spillway some time prior to the accident. It permitted water to flow in the canal, and it could not have been done for any purpose other than to supply the needs of stockholders, including those who used water below the spillway; and, since the defendant had in effect authorized its stockholders to change conditions at the spillway to get water to the eastward, it could not say that it did not anticipate that water would be used below that point after it had adjusted the spillway and headgate.

Offered instructions 8, 10, and 11 were properly refused. It cannot be said, as a matter of law, that a stockholder is not [8] the agent of the corporation. Whether he is such agent depends upon the facts of the particular case, and in this instance we think it is very clear that the stockholders were constituted the agents of the defendant company, for certain purposes at least. The instructions given by the trial court seem to have presented the issues to the jury fully.

The defendant objected to the court making findings of fact and conclusions of law upon the equity branch of the case, upon the ground that plaintiff did not request such findings at the [9] conclusion of the evidence. Section 6763, Revised Codes, requires such findings to be made by the court, whether there is any request for them or not. While it is true that error cannot be predicated upon the trial court's refusal to make findings, unless requested (section 6766), the failure of counsel to make the request does not relieve the court of its duty under section 6763.

The cause appears to have been tried exceedingly well upon the part of court and counsel, and with the result we do not feel justified in interfering.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

ORTON, RESPONDENT, v. BENDER, APPELLANT.

(No. 2,940.)

(Submitted April 17, 1911. Decided April 29, 1911.)

[115 Pac. 406.]

Mining Claims—Adverse Suits—Appeal—Credibility of Witnesses—Review—New Trial—Surprise—Newly Discovered Evidence—Discretion—Error—Presumptions.

Appeal—Equity Cases—Insufficiency of Evidence—Findings—Conclusive-ness.

1. To secure a reversal of the decree in an equity case on the ground that the evidence is insufficient to sustain the findings of the court, the appellant has the burden of showing that the evidence preponderates against them.

Same—Equity Cases—Credibility of Witnesses—Review.

2. In a cause tried without a jury, the credibility of the witnesses is a matter exclusively for the trial court to determine.

New Trial—Surprise—What does not Constitute.

3. That defendant in an adverse suit, relying upon the idea that plaintiff would attack his quartz location upon a certain ground, had prepared his case to meet that ground, but on the trial was confronted with a different theory, was not a valid ground for a motion for new trial because of accident and surprise. A party litigant must be prepared to meet all issues raised by the pleadings.

Same—Newly Discovered Evidence—Discretion.

4. The granting or refusing of a new trial on the ground of newly discovered evidence rests largely in the discretion of the trial court; in the absence of abuse of such discretion, its ruling will not be disturbed on appeal.

Appeal—Error—Presumptions.

5. Error must be made to appear; it will not be presumed.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by William C. Orton against Lewis B. Bender. Judgment for plaintiff, and defendant appeals from it and an order denying him a new trial. Affirmed.

Cause submitted on briefs of counsel.

Messrs. Kirk, Bourquin & Kirk, for Appellant.

Mr. L. P. Forestell, and Mr. I. A. Cohen, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In October, 1907, Lewis B. Bender made application in the United States land office for patent to the Friday lode claim. Within the period of publication of notice, William C. Orton filed his protest and adverse, claiming that a portion of the ground included in the Friday claim belongs to, and is included in the boundaries of, the Merchant lode claim, owned by Orton. The adverse was allowed and proceedings in the land office stayed. Within thirty days thereafter, this action was commenced by Orton to quiet title to the area in conflict. The plaintiff claims the disputed portion, by virtue of his location of the Merchant lode claim, made February 20, 1906. The defendant claims the same ground by virtue of the Friday lode claim, which it is alleged was located August 16, 1905. The cause having been brought to issue was tried to the court without a jury. Findings of fact and conclusions of law were made, and a decree rendered and entered, adjudging plaintiff to be entitled to the disputed territory. From that judgment and an order denying him a new trial, the defendant appealed.

The trial court found that in August, 1905, Bray and Spencer, the predecessors of defendant, made discovery of mineral-bearing rock in place and posted notice, claiming the ground as the Friday lode claim; that they marked the boundaries, and, on October 26, filed for record the declaratory statement containing the matters required by statute. Finding No. 5 is as follows: "That neither of said locators, Bray or Spencer, or either of them, or the defendant, at any time within sixty days, or at any time prior to February 20, 1906, subsequent to August 16, 1905, sank or caused to be sunk, at the point of discovery, or elsewhere upon said claim, a shaft at least ten feet deep from the lowest part of the rim of such shaft at the surface, or of any greater depth than eight feet and nine inches." The court further found that the locators of the Friday claim, after posting notice, altered the notice by changing the date from August to October, for the purpose of postponing the time within which

the development work would have to be done, and that they used as a part of their discovery shaft an old, abandoned hole. Finding No. 20, made by the court, follows: "That the locators of the alleged Friday lode claim did not, at any time prior to the 20th day of February, 1906, intend in good faith to sink a discovery shaft upon said lode or claim to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice or valuable deposit, within sixty days from the date of posting said notice upon said claim." The court also found that Orton made discovery and a valid location of the ground in controversy on February 20, 1906, and perfected his location of the Merchant lode claim.

While there are many assignments of error, counsel for appellant in their brief say: "The only serious question in this case is whether or not the Friday locators sunk the Friday discovery shaft ten feet below the lowest point of the rim before February 20, 1906, when respondent initiated his Merchant lode location." They also contend that the evidence preponderates in favor of an affirmative answer to this question. We are not able to agree with counsel that there is not a substantial conflict in the evidence as to the extent and character of the development work done on the Friday lode claim prior to February 20, 1906.

Since the defendant relies upon a discovery made in August, 1905, and insists that by virtue of the acts done by him and his predecessors in interest the area in conflict was withdrawn from the public domain, and was not subject to location on February 20, 1906, when plaintiff made discovery and attempted to locate the Merchant claim, it must appear that the defendant complied with the requirements of the law prior to February 20, 1906. Those requirements in force at that time were: "(1) The discovery of a vein or lode; (2) the posting of a notice of location at the point of discovery containing the matters designated by section 3610 [Political Code, 1895]; (3) the marking of the boundaries on the ground, and the doing of certain development work, designated in section 3611; and (4)

the filing for record of a declaratory statement containing the matters mentioned in section 3612." (*Butte Consolidated Min. Co. v. Barker*, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177; *Butte Northern Copper Co. v. Radmilovich*, 39 Mont. 157, 101 Pac. 1078; *Thornton v. Kaufman*, 40 Mont. 282, 135 Am. St. Rep. 618, 106 Pac. 361.) The development work which the statute then required, so far as involved here, consisted in sinking "a shaft upon the lode or claim to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice or valuable deposit." (Section 3611, above.)

In speaking of this development work, the court, in *Butte Consolidated Min. Co. v. Barker*, *supra*, said: "The doing of this development work and the filing for record of the declaratory statement are purely statutory requirements, which the state may rightfully exact in addition to the acts required by federal statutes." And again: "The requirements that a shaft be sunk upon the claim ten feet deep, or deeper, if necessary to disclose a well-defined crevice or valuable deposit, * * * has a double purpose in view: '(1) To demonstrate to a reasonable degree of certainty that the deposit sought to be located as a lode is in fact a vein of quartz or other rock in place; (2) to compel the discoverer to manifest his intention to claim the ground in good faith under the mining laws.' "

The trial court found that the defendant failed to comply with the requirements of the statute in a material respect. To [1] secure a reversal of this finding, the appellant in this court must assume the burden of showing from the record that the evidence preponderates against the finding made. In *Kift v. Mason*, 42 Mont. 232, 112 Pac. 392, this court said: "It is the rule in this state, now too well established to be open to further controversy, that on appeal in an equity case the findings of the trial court will be sustained, unless it appears that the evidence preponderates against such findings"; citing *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finden v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Pope v. Alexander*, 36 Mont. 82, 96 Pac. 203, 565; *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860.

It appears from the record that the presiding judge of the trial court was invited to inspect the property in controversy during the course of the trial, and counsel for respondent in their brief assert that such inspection was made. We shall assume this to be the fact, though it is not of very much consequence here. A review of the evidence discloses a very pronounced conflict upon almost every question presented for determination, particularly upon the question of the character and extent of the development work done upon the Friday claim. To set forth even a brief summary showing the conflict would not serve any useful purpose.

It does not aid defendant that the trial court in some of its findings apparently discredited witnesses for the plaintiff. In *Noyes' Estate*, 40 Mont. 178, 105 Pac. 1013, we held that the [2] credibility of a witness is a matter exclusively for the trial court to determine, in a case submitted without a jury. The trial court had the witnesses before it, heard them testify, observed their demeanor on the witness-stand, and was in a much more advantageous position to judge of their credibility and of the weight to be given to their testimony, than are the members of this court. Upon the evidence before us, we cannot say that the trial court was not fully justified in finding that the locators of the Friday claim did not do the development work required by law—in fact, that they did not act in good faith in attempting to locate the Friday claim.

One ground of the motion for a new trial is accident and surprise, which ordinary prudence could not have guarded against, and another is newly discovered evidence. Issue was made upon the validity of the location of the Friday claim in [3] the pleadings, and defendant cannot now be heard to say that plaintiff attacked that location upon a ground different from the one he was led to believe would be relied upon by the plaintiff. A party litigant must prepare himself to meet all issues raised by the pleadings, and if he does not do so, he cannot plead accident or surprise after he has been defeated. In *Hill v. McKay*, 36 Mont. 440, 93 Pac. 345, this court considered a similar question, and our observations then made are

pertinent here and conclusive against appellant on this ground of his motion.

Defendant presented to the trial court an affidavit of J. H. Crone, to the effect that affiant had measured the discovery shaft on the Friday claim in 1905, and then ascertained that it was more than ten feet deep from the lowest part of the rim. Plaintiff presented a counter-affidavit by J. H. Tiggerman, to the effect that he has known Crone for sixteen years, that he knows Crone's reputation for truth and veracity in the neighborhood where he lives, and that the same is bad. In *Landreau v. Frazier*, 30 Mont. 267, 76 Pac. 290, this court said: "In most respects this new evidence would be merely cumulative and of an impeaching nature. As the granting or refusing of a [4] new trial upon the ground of surprise or newly discovered evidence rests largely in the discretion of the trial court, and as the record does not disclose an abuse of discretion in this instance, the ruling of the court below will not be disturbed"; citing numerous cases. The language just quoted is peculiarly applicable here.

The record includes all the evidence taken before the trial court touching the discovery and location of the Merchant claim, although there is not any attack made upon that location. It is conceded that the Merchant claim is valid, if the ground was open to entry on February 20, 1906. Much needless expense has been incurred in preparing the transcript for this court. Counsel for appellant in their brief assert that respondent is responsible for this, but the only recital in the record is: "On October 6, 1909, and within the time allowed therefor by the court, defendant duly served his proposed bill of exceptions upon plaintiff; and within time allowed therefor plaintiff duly served his proposed amendments of 127 pages upon defendant. The amendments were thereafter allowed by the court and incorporated herein." It is impossible for us to determine the character of the amendments proposed. It does not appear that counsel for defendant objected to the allowance of the amendments, and we must assume that they were proper and cor-

rectly incorporated as a part of the record. Error must be made to appear. It will not be presumed.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

**ALLEN, RESPONDENT, v. BEAR CREEK COAL CO. ET AL.,
APPELLANTS.**

(No. 2,973.)

(Submitted April 7, 1911, Decided April 29, 1911.)

[115 Pac. 673.]

Personal Injuries—Master and Servant—Coal Mines—Safe Place—Contributory Negligence—Assumption of Risk—Independent Contractor—Instructions—Excessive Verdict—Complaint—Sufficiency.

Personal Injuries—Complaint—Causal Connection—Sufficiency of Pleading.

1. Under the rule that whatever is necessarily implied from a statement directly made in a pleading, or is reasonably to be inferred therefrom, is to be taken as directly averred, the complaint in an action to recover damages for injuries sustained in a coal mine through the fall of rock, which, though failing to state specifically that defendant's omission to properly timber the room in which plaintiff worked was the cause of the fall, did aver insufficient timbering, a dangerous condition resulting therefrom, the fall of the rock upon plaintiff, and that defendant "by causing said rock to fall upon plaintiff" crushed and injured him, etc., was sufficient in this regard; the cause of the fall, i. e., defendant's negligence in failing to properly timber the place was a necessary inference from the averments made.

Pleadings—Indefiniteness—Special Demurser.

2. The objection that a complaint is indefinite must be made by special demurser.

Personal Injuries—Negligence—Pleading and Proof—Irrelevancy.

3. Proof of an act of negligence on the part of defendant master not pleaded in the complaint was irrelevant.

Same—Master and Servant—Coal Mines—Duty of Master—Custom—Evidence—Inadmissibility.

4. Though it was error to permit plaintiff's witnesses to testify that it is customary for coal mine operators to see that the places to which their employees are sent to work are first put in safe condition, it was nonprejudicial, the presumption being that the jury accepted the law as announced by the court: that it is incumbent upon the master to

exercise ordinary care and diligence to provide his servant with a reasonably safe place in which to work,—rather than as stated by the witnesses.

Same—Improper Cross-examination—Mitigation of Damages.

5. The court properly sustained an objection to a question asked a physician on cross-examination, the purpose of which was, not to test the truth of a statement made by him on direct examination relative to the extent and character of plaintiff's injury, but to elicit evidence in mitigation of damages, to-wit, that he had offered to perform without charge the necessary surgical operation to restore plaintiff's hand to usefulness.

Same—Questions for Jury.

6. The evidence upon the questions whether defendant was reasonably diligent in making the place in which he worked reasonably safe, whether he had been directed to work therein, and whether he was guilty of contributory negligence or assumed the risk, having been in substantial conflict, they were for the jury to determine.

Same—Safe Place to Work—Changing Conditions—Duty of Servant.

7. Plaintiff, if directed to work in a certain room in defendant's coal mine, had a right to assume that his employer had exercised reasonable diligence to inspect and make it safe, and, though he (plaintiff) was required to observe and guard himself against such dangers as were open and obvious to his senses, he was not under any obligations to make tests by sounding the roof to ascertain whether it was loose or likely to fall.

Same.

8. Where a place is completed, the obligation to take precautions to see that it is reasonably safe for his employee rests upon the master; where, however, changes are made in it by the former as the work progresses, the duty to make it safe rests upon him (the employee), the dangers arising from constantly changing conditions in such a place being assumed by him as incidental to his employment.

Same—Independent Contractor or Servant—How Determined.

9. Held, that plaintiff, who worked under the same rules as other coal miners employed by defendant company and was required to obey the directions of its officers as to the details of his work and the means by which it was accomplished, was a servant and not an independent contractor, though he was paid a stipulated sum per ton mined by him.

Same—Instructions—Errors—Review.

10. Under section 6746, Revised Codes, such errors in instructions as were not called to the attention of the district court at the settlement of the instructions will not be considered on appeal.

Same—Instructions—To be Considered Together.

11. The instructions to the jury must be considered together; hence the contention that the defendant suffered prejudice because in one paragraph of its charge the court told the jury that if defendant or its officers were negligent, the plaintiff, "having exercised due care upon his part," should recover, was without merit, where in subsequent instructions the defenses of contributory negligence and assumption of risk were fully covered.

Same—Negligence—Liability of Agents.

12. Defendant company's superintendent and mine foreman could be held liable only for their individual wrongful acts or omissions within the scope of their employment; therefore, an instruction which permitted a recovery of damages against both, without regard to whether the one or the other, or both, were guilty of the negligence alleged by plaintiff, was erroneous.

Same—Instructions—Assumption of Fact—Error.

13. Plaintiff alleged in his complaint that he was in a room in defendant's coal mine pursuant to its command at the time he was injured. Defendant averred that he was there not only without direction but in violation of one of its rules. The court instructed the jury that it was the duty of defendant to make the place reasonably safe "for its servants to be, who were ordered" to work in that place, and that "then its servants who were so ordered to go into" it had a right to assume that defendant had done its duty, etc. Held, that the instruction was prejudicially erroneous in that it assumed as proven one of the principal issues in the case, i. e., whether plaintiff was in the place in the course of his employment or not.

Same—Instructions—Law of Case—Disregard by Jury—Effect.

14. The instructions are the law of the case and binding upon the jury; hence where the plaintiff himself had testified that he had not tested the roof of the room in the coal mine in which he was injured, and the court charged the jury (though erroneously) that he could not recover if he had not done so upon entering the place and was thereafter hurt through a fall of rock, a verdict in his favor was in disregard of the instruction, necessitating a new trial.

Same—Excessive Verdict—Passion and Prejudice.

15. Plaintiff, a coal miner, was fifty-nine years of age at the time of the accident which resulted in the loss of the third finger of his right hand and the laceration of the palm in such a way as to stiffen the second finger. His earnings, with the assistance of two minor sons, had not exceeded \$144 per month for some time. The jury, in arriving at a verdict of \$10,000, not only disregarded uncontradicted evidence to the effect that the disabled condition of his hand was partly due to his refusal to have it treated, but also an instruction which in substance was a direction to find in favor of defendant. Held, that the verdict was so excessive as to show passion and prejudice rather than inadvertence on the part of the jury in making their estimate.

Appeal from District Court, Carbon County; Sydney Fox, Judge.

Action by John Allen against the Bear Creek Coal Company and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed and remanded.

Mr. George W. Pierson, and Mr. W. W. Patterson, submitted a brief in behalf of Appellants. Mr. W. M. Johnston, of counsel, argued the cause orally.

Even though there was a breach of duty on the part of the defendants in failing to sufficiently timber the room, no liability can flow from such breach of duty unless it be shown that it resulted in the injury. Hence that fact must be alleged in the pleading. Having failed to state the cause of the rock falling, the complaint does not contain "a statement of the facts con-

stituting the cause of action," if any existed. (Rev. Codes, sec. 6532; *Fearon v. Mullins*, 35 Mont. 232, 88 Pac. 794; *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29; *Hoskins v. Northern Pac. Ry. Co.*, 39 Mont. 394, 102 Pac. 988; *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373; *Burkett v. Griffith*, 90 Cal. 532, 25 Am. St. Rep. 151, 27 Pac. 527, 13 L. R. A. 707; *Campbell v. Jones*, 38 Cal. 507; *Woodward v. Oregon Ry. & Nav. Co.*, 18 Or. 289, 22 Pac. 1076; *McPherson v. Pacific Bridge Co.*, 20 Or. 486, 26 Pac. 560; Thompson on Negligence, secs. 1246, 7457, 7458; 16 Ency. of Pl. & Pr. 376; Estee's Pleadings, sec. 196.) It is not a question of what might have caused the fall of the rock, but what actually caused it. The ultimate fact, to-wit, the cause of the fall, must necessarily result from the facts pleaded. There can be no presumption as to the cause from the pleading of the existence of other facts. (*Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Olsen v. Montana Ore Purchasing Co.*, 35 Mont. 400, 89 Pac. 731; *Van De Sande v. Hall*, 13 How. Pr. (N. Y. Sup. Ct.) 458; *Scott v. Robards*, 67 Mo. 289; *Malone v. Craig*, 22 Tex. 609; *Seligson v. Hobby*, 51 Tex. 147; *Rumbough v. Southern Improvement Co.*, 106 N. C. 461, 11 S. E. 528.) Furthermore, to state a cause of action, the complaint must also allege that the master had knowledge of the efficient cause of the injury, or, by the exercise of reasonable diligence, ought to have had such knowledge. (*Fearon v. Mullins*, *supra*; *Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633; *Southern Bell Tel. Co. v. Starnes*, 122 Ga. 602, 50 S. E. 343; *Malott v. Sample*, 164 Ind. 645, 74 N. E. 245; *Louisville E. & St. L. Consolidated Ry. Co. v. Hicks*, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767; *Parrott v. New Orleans & N. E. R. Co.*, 62 Fed. 562; *Cleveland C. C. & St. L. Ry. Co. v. Sloan*, 11 Ind. App. 401, 39 N. E. 174; 6 Thompson on Negligence, sec. 7529; White on Personal Injuries in Mines, sec. 48.)

As the complaint was confined solely to defendants' failure to properly timber room 13, evidence of their failure to furnish plaintiff props with which to timber it was inadmissible. (*Pierce v. Great Falls & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867;

Hoskins v. Northern Pac. Ry. Co., supra; Kelly v. N. P. Ry. Co., 35 Mont. 243, 88 Pac. 1009; *Forsell v. Pittsburg & Mont. Min. Co.*, 38 Mont. 403, 100 Pac. 218; *Power & Bro. v. Turner*, 37 Mont. 521, 540, 97 Pac. 950.) From the above cases it follows that if proof of some ground of recovery other than the one alleged in the complaint will not support a verdict, evidence in support of such ground of recovery is immaterial and irrelevant. (*Flaherty v. Butte Electric Ry. Co.*, 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 416; see, also, *Cherokee & P. Coal & Min. Co. v. Wilson*, 47 Kan. 460, 28 Pac. 178; *Clark v. Missouri Pac. Ry. Co.*, 48 Kan. 654, 29 Pac. 1138; *White on Personal Injuries in Mines*, sec. 47.)

It is a well-settled principle that even though the defendant is admittedly responsible for the injuries sustained, the law imposes upon the plaintiff the active duty to use all ordinary care and make all reasonable exertions to decrease the extent of the injury as much as possible, and if he does not do so, he cannot recover damages for the increased loss which might have been thus avoided. It is for this reason that the plaintiff is entitled to recover all expenses so incurred. (*Ashley v. Rocky Mt. Bell Tel. Co.*, 25 Mont. 286, 64 Pac. 765; *Sweeney v. Montana Cent. Ry. Co.*, 19 Mont. 163, 47 Pac. 791; 1 Sutherland on Damages, sec. 88; 13 Cyc. 76, and cases cited.) This principle has been applied to cases arising in contract and tort, and particularly to personal injury cases where it was shown that an operation would decrease the extent of the injuries. (*Texas etc. Ry. Co. v. White*, 101 Fed. 928, 42 C. C. A. 86, 62 L. R. A. 90; *Owens v. Baltimore & O. R. Co.*, 35 Fed. 715, 1 L. R. A. 75; *City of Goshen v. England*, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; *Louisville & N. R. Co. v. Burke*, 46 Tenn. 45; *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616.) While defendants did not allege in their answer that the extent of plaintiff's injuries might have been lessened by an operation, it is to be noted that such an allegation is not a prerequisite to introduce evidence along that line. (*Waxahachie v. Connor* (Tex. Civ. App.), 35 S. W. 692; 3 Cyc. 76, and note.).

Under the evidence, plaintiff had a contract with the defendant company to draw pillars, for which he was paid by the ton, and had his two sons working under him; he had entire charge of the work he did, and represented the master only as to the result of his work. These facts made him an independent contractor. (*White on Personal Injuries in Mines*, sec. 537; *Jensen v. Barbour*, 15 Mont. 582, 39 Pac. 906; *Poor v. Madison River Power Co.*, 38 Mont. 341, 99 Pac. 947; *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386; *Gayle v. Missouri Foundry etc. Co.*, 177 Mo. 427, 76 S. W. 987; 1 Thompson on Negligence, secs. 622, 629, 637; *Harris v. McNamara*, 67 Ala. 181, 12 South. 103; *New Albany Forge & Rolling Mill v. Cooper*, 131 Ind. 363, 30 N. E. 294; *City of Groesbeck v. Pinson*, 21 Tex. Civ. App. 44, 50 S. W. 620; *Southwestern Telegraph & Tel. Co. v. Paris*, 39 Tex. Civ. App. 424, 87 S. W. 724; *Merriweather v. Sayre Min. & Mfg. Co.*, 161 Ala. 441, 49 South. 916.) Being an independent contractor and having supervision of the work, defendants did not owe plaintiff the duty of inspection, and any danger in the roof that could have been ascertained by inspection was necessarily assumed by him as a part of his contract.

Mr. A. C. Spencer, and *Messrs. Meyer & Wiggenhorn*, submitted a brief in behalf of Respondent. Oral argument by *Mr. Wiggenhorn*.

Counsel for appellants cite *Fearon v. Mullins*, 35 Mont. 232, 88 Pac. 794, as sustaining their contention that plaintiff's complaint does not show a causal connection between the negligence of the defendants and the injury to the plaintiff. Respondent admits that "the complaint should set out facts showing wherein the danger consisted and the causal connection between the defective place and the injury," and that "not only so, but it must also allege that the master had knowledge of the efficient cause of the injury, or, by the exercise of reasonable diligence, ought to have had knowledge." (*Fearon v. Mullins*, 35 Mont. 236, 88 Pac. 794; 6 Thompson on Negligence, secs. 7527-7529.) Respondent contends that the citations above not only do not

support the contention of appellants, but strengthen the position of the respondent that the causal connection between the negligence of the defendants and the injury to the plaintiff should appear from the facts set forth, and a mere named allegation to that effect without the facts, as appellants contend, is insufficient. The cases of *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515, and *Olsen v. Montana Ore Purchasing Co.*, 35 Mont. 400, 410, 89 Pac. 731, have no application to the question contended for by appellants, and are simply authorities to sustain the proposition that there must be proof of the allegations of the complaint.

Where the facts pleaded show that the plaintiff's injury was the proximate result of the defendants' wrong, this is sufficient, without a direct averment, to show a causal connection between the negligence of defendant and the injury to plaintiff. (*Wabash etc. v. Pearson*, 120 Ind. 426, 16 Am. St. Rep. 325, 22 N. E. 134; *Island Coal Co. v. Clemmitt*, 18 Ind. App. 21, 49 N. E. 38; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874.)

In driving tunnels, rooms, etc., in mines and creating places, after such tunnels, rooms, etc., have been completed, it is the duty of the master to keep them safe by the use of ordinary care and he must perform this duty by inspection and repair from time to time, to keep and preserve that condition. The duty to inspect and repair and keep the place safe after completion pertains exclusively to the master, and a servant who has been ordered by the master to a place of work and in going to such place must pass through completed tunnels, rooms or completed places, has the right to assume that the master has done his duty, and that such completed places are reasonably safe and free from danger. (*Thurman v. Pittsburgh Co.*, 41 Mont. 141-156, 108 Pac. 588; *Shaw v. New Year Co.*, 31 Mont. 138, 77 Pac. 515; *Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633; *Berg v. Boston & Mont. etc. Min. Co.*, 12 Mont. 212, 29 Pac. 545, 17 Morr. Min. Rep. 470.)

"If the evidence does not conclusively establish that the injured servant assumed the risk, the fact that the servant did not establish affirmatively that he had no knowledge of the

source of danger and therefore did not waive it will not prevent a finding that he was not chargeable with such knowledge." (6 Thompson on Negligence, sec. 7743; *Boyd v. Blumenthal*, 3 Penne. (Del.) 564, 52 Atl. 330; *Stucke v. Orleans R. Co.*, 50 La. Ann. 172, 23 South. 342.) It appears affirmatively that the plaintiff did not know of any dangerous condition of the roof, and that he had used all the necessary precautions to discover such danger, and under the rule as laid down by this court "that it is not sufficient that the plaintiff knows of the risk; he must appreciate the danger as well." (*Stewart v. Pittsburgh-Montana Co.* (Mont.), 111 Pac. 723; *O'Brien v. Corra Rock Island Co.*, 40 Mont. 212, 105 Pac. 724; *Hollingsworth v. Davis-Daly Estate*, 38 Mont. 143, 99 Pac. 142; *Stevens v. Elliot*, 36 Mont. 92, 92 Pac. 45.)

Each instruction is to be considered as a whole in the light of the pleadings and testimony. (*Lehane v. Butte Electric Ry. Co.*, 37 Mont. 564, 97 Pac. 1038; *Mulligan v. Montana Union Ry. Co.*, 19 Mont. 135, 47 Pac. 795; *Pryor v. City of Walkerville*, 31 Mont. 618, 79 Pac. 240; *State v. Fuller*, 34 Mont. 12, 85 Pac. 369, 8 L. R. A., n. s., 762, 9 Ann. Cas. 648; *Pryor v. Walkerville*, 31 Mont. 618, 79 Pac. 240.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by the plaintiff to recover damages for an injury suffered by him during the course of his employment by the Bear Creek Coal Company, as a coal miner. The defendant Hopka was the superintendent, having general control of the mines of the company, and defendant Fleming was the mine foreman. The complaint alleges:

"(4) That it was the duty of the said defendants, and each and all of them, on or about the 23d day of December, 1908, and at the time of the injury hereinafter complained of and more particularly described, to sufficiently timber a certain place in said mine, which said place was known as room 13 in No. 3 mine, second east entry, and it was their duty to inspect such

place at such intervals as might enable them to make the said place reasonably free from danger.

"(5) That it was the duty of the said defendants at all times to use reasonable and ordinary care to furnish this plaintiff with a reasonably safe place to work when obeying orders of said defendants.

"(6) That at the time of the grievance hereinafter complained of, and for a long time prior thereto, a condition of insufficient timbering had existed, and that said condition of insufficient timbering was either actually known to the said defendants, or by the exercise of ordinary and reasonable care the said defendants would have known of such insufficient timbering and dangerous condition; but this plaintiff says that he did not know that the said condition was dangerous, and did not know that the place where he was working was unsafe.

"(7) That on or about the 23d day of December, 1908, while this plaintiff, acting under the command of the defendants, was working in said coal mine, at the said place known as room 13, mine No. 3, second east entry, it was then and there his duty, as a servant of the said defendants, to go into said room No. 13 for the purpose of drawing or removing pillar No. 13, said pillar then and there being situated and located between what was known as room No. 13 and room No. 11, said operation of removing said pillar No. 13 being known and spoken of as 'drawing the pillar,' and the said room No. 13, the place where this plaintiff was and was about to work and was working, was unsafe by reason of insufficient timbering and want of timbering, and that by reason of the lack of timbering of said room 13 the rocks directly above the head of this plaintiff in said room 13, where said plaintiff was working, were loose and liable to fall down and crush this plaintiff at any time.

"(8) That plaintiff further says that, on or about the said 23d day of December, 1908, where he was so in and working in said room No. 13 in said unsafe and dangerous condition, a large quantity of rock weighing many tons fell upon this plaintiff, which said large quantity of rock had been negligently left in a loose, dangerous condition by reason of want of timbering,

as hereinbefore set forth, and the said defendants, by causing the said rocks to fall upon this plaintiff, thereby crushed and mashed and otherwise injured said plaintiff's right hand and arm, so that it became necessary for this plaintiff to have a portion of his said right hand amputated, and that by reason of said injury so negligently done and inflicted by the said defendants this plaintiff's said right hand has been permanently injured and rendered absolutely useless for the rest of his natural life."

The defendants answered jointly by a general denial of negligence on their part, with allegations of assumption of risk and contributory negligence on the part of plaintiff. The trial resulted in a verdict for plaintiff for \$10,000. From the judgment entered thereon, and an order denying their motion for a new trial, defendants have appealed.

1. At the commencement of the trial, defendants objected to the introduction of evidence, on the ground that the complaint fails to state a cause of action. It is argued that, while it is alleged that a large quantity of rock fell upon the plaintiff and injured him, the cause of its fall is not alleged. A complaint must contain a statement of facts constituting the cause of action, in ordinary and concise language. (Rev. Codes, sec. 6532.) The rule applicable to determine its effect, however, is that "its allegations must be liberally construed, with a view to substantial justice between the parties." (Section 6566.) This rule does not permit the reading into the pleading of a statement of a necessary, substantial fact which has been omitted, so as to make it state a cause of action where none is stated (*Conrad Nat. Bank v. Great Northern Ry. Co.*, 24 Mont. 178, 61 Pac. 1); but it does require that whatever is necessarily [1] implied by a statement directly made, or is reasonably to be inferred therefrom, is to be taken as directly averred. (*County of Silver Bow v. Davies*, 40 Mont. 418, 107 Pac. 81; Phillips on Code Pleading, sec. 352; Baylies on Code Pleading, 49, 102; 31 Cyc. 80.) The complaint is not clear and direct in its statements; but we think that it is sufficient to meet the test prescribed by the statute. It is elementary that the averments

of fact must be sufficiently specific to show the causal connection between the omission of duty by the defendant and the injury complained of; that is the gist of the action. (*Fearon v. Mullins*, 35 Mont. 232, 88 Pac. 794; Thompson on Negligence, sec. 7467.) But a pleading comes within the rule when from the facts stated the causal connection must necessarily be inferred. There is no specific allegation that the omission to timber caused the rock to fall; yet this is a necessary inference from the allegations of the omission, the dangerous condition resulting from it, which was known to defendants, and the consequent fall, causing the injury. Besides, in paragraph 8 is found the allegation that "the said defendants, by causing the said rocks to fall upon this plaintiff," etc. This ill-expressed statement, construed with the preceding allegations, and given the meaning which the pleader evidently intended to express, *viz.*, that the omission to timber was the cause of the fall, renders the pleading sufficiently explicit.

It is also argued that the complaint is insufficient, because it is not alleged explicitly in paragraph 6 at what point in the mine the condition of insufficient timbering existed. But, when this paragraph is read in connection with paragraphs 4 and 7, it is clear that it can refer only to the place where plaintiff was working in room 13, where he was injured, and the defendants' knowledge as to the conditions there. The fault to be found [2] with this feature of the pleading is that it is indefinite, rather than insufficient. This objection to it should have been made by special demurrer.

2. Access to defendant company's mine is gained through an opening driven in on the slope of the vein, called the main entry. At right angles in both directions from this are driven side entries, which are connected at some distance from the main entry by a back entry parallel with the main entry. From the side entries, and parallel with the main entry, are driven rooms. The coal is first all removed, except pillars between the rooms, left standing to support the roof. The rooms are numbered, and the pillars take the numbers of the rooms. The roof over the spaces from which the coal has been removed is supported

by props of timber. When the vein has been exhausted, the pillars are taken out, and that portion of the mine is abandoned. The part of the pillar farthest from the entry is called the "face"; the side of the pillar is called the "rib"; and the portion of the room on that side is called the "gob." The timber props are placed in the gob in lines parallel with the rib, the line next to the rib just far enough away to permit a car track to be laid alongside of the rib. The plaintiff and his two sons were employed in mining, or "drawing," pillars and loading the coal into cars. As they removed the coal, beginning at the face, it was their duty to put in other timber supports to prevent falls of rock during the work. Timbers were furnished for this purpose by the company, through the superintendent or foreman, upon requests made to the motorman in charge of the cars. Prior to December 20, plaintiff and his two sons had been drawing pillar 9. It had appeared from the testimony of the plaintiff that Fleming, the foreman, having gone to pillar 9 and found the drawing about finished, told the plaintiff, when he had finished it, to begin work on pillar 13, stating that he would have the car track put in room 13 at once; that the work having been finished on the 22d, plaintiff ordered timbers for props to be sent into room 13; that on the morning of the 23d he and his sons went into the room in pursuance of Fleming's order to begin work, but found no timbers; that they began to prepare places for setting the timbers necessary to be put in when they began to take out coal, and that while they were so engaged a heavy fall of rock, coming from a point near the face, caught plaintiff and injured him. Robert Allen, a son, gave substantially the same testimony. During the course of his examination in chief, he gave this testimony: "Q. Now, do you know whether the requests or orders for props or timbers for your use in drawing that pillar had been given to the motorman, other than on the 22d of December, as you have testified to? A. Father told him on the 21st to bring timbers into No. 13 pillar. They had been ordered on the bulletin hanging on the mouth of the mine on the 22d." This testimony was admitted over defendants' objection that it was irrelevant. Contention

is made that the ruling was prejudicially erroneous, because the evidence tended to establish negligence not alleged in the complaint. The evidence was irrelevant. The question at issue was whether the defendants had used proper precautions to make safe the place into which the plaintiff had been directed to go, and not whether they had used ordinary care to provide him with the materials necessary to keep the place safe as the work progressed. It was the duty of defendants to do both; but proof [3] of an omission of the second duty was wholly irrelevant to the inquiry as to whether they had omitted the first. (*Forsell v. Pittsburgh & Mont. C. Co.*, 38 Mont. 403, 100 Pac. 218; *Flaherty v. Butte Electric Ry. Co.*, 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 416.) But, even so, the ruling was not prejudicial. The witness and his father both had already stated, without objection, that timbers, though ordered in ample time, had not been furnished. The fact that they had been ordered twice added nothing to the import of the testimony theretofore given.

The plaintiff and several other witnesses were permitted, over objection of defendants, to testify that it is the duty of mine [4] owners generally, and customary for them, to see that the places to which their employees are sent to work are first put in a safe condition. Counsel for defendants say that the witnesses not only testified to a rule of law, but that the rule as stated by them is erroneous, in that it makes absolute safety the measure of the employer's duty. It is not possible to understand the theory upon which the evidence was offered or admitted. The rule of law is that it is incumbent upon the master to exercise ordinary care and diligence to provide his employee with a reasonably safe place in which to work. (*Longpre v. Big Blackfoot Milling Co.*, 38 Mont. 99, 99 Pac. 131; *O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. 212, 105 Pac. 724.) It was incumbent upon the court to so state the law to the jury. Therefore, the inquiry whether or not coal operators generally were accustomed to perform this legal duty toward their employees could not aid the jury in determining whether defendants had neglected their duty toward the plaintiff. The answer

to this question was to be ascertained from the facts of this case, as they were testified to by the witnesses, and not from the opinions or knowledge of witnesses as to the conditions prevalent, or a custom existing elsewhere. Indeed, the defendants sought to show that it was the rule of the company, well understood by all their employees, that no one of them was permitted to go into any room to draw a pillar, until the timbers and roof had been inspected and found to be in a safe condition, or had been put in a safe condition, either by the particular employee under the direction of the foreman, or, in case he refused to do the necessary repairs, by other employees sent in specially for that purpose. In assuming this position, the defendants recognized the measure of their duty, as they must have done in any event. While admitting that the rule was as claimed by the defendants, the plaintiff claimed that he was justified in assuming that room 13 had been inspected and put in a safe condition, because, as he and his sons stated, Fleming, the foreman, had told them when he saw them at pillar 9 on the 20th that as soon as they had completed the work there they should begin work on pillar 13. Still we do not think the evidence wrought any prejudice, because we must presume that the jury accepted the law as declared by the court, rather than as stated by the witnesses.

The evidence of plaintiff showed that in an effort to escape when the fall of rock occurred, his hand was caught between it and a prop timber, with the result that the third finger was cut off and the hand otherwise lacerated, so that the second finger was so badly drawn as to be useless. Dr. Siegfried, called to testify as to the extent and character of the injury, having [5] stated on cross-examination that the tendons were not injured, and that by a surgical operation the drawn finger could be straightened and thus restored to usefulness, was asked if he had offered to perform that operation. An objection that the question was not proper cross-examination was sustained. The offer was then made to prove that the witness had told the plaintiff that he would perform the operation without charge. An objection to the offer on the same ground was also sustained.

The ruling was correct. The purpose of the question was, not to test the truth of the statement made by the witness—the special office of cross-examination—but to bring out evidence material to the defense, that is, in mitigation of damages. For this purpose the evidence sought was material and competent. (*Sweeney v. Montana Central Ry. Co.*, 19 Mont. 163, 47 Pac. 791; *Ashley v. Rocky Mt. Bell Tel. Co.*, 25 Mont. 286, 64 Pac. 765; 1 Sutherland on Damages, sec. 88; 13 Cyc. 76; *Texas-Pac. Ry. Co. v. White*, 101 Fed. 928, 42 C. C. A. 86, 62 L. R. A. 90; *City of Goshen v. England*, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.) And this was the view entertained by the trial court; for the witness, recalled later by the defendants, was permitted to testify that he had advised the operation, but that plaintiff refused to have him perform it. Other rulings of the court upon questions of evidence are assigned as error, but we find none of them of sufficient importance to demand special notice.

3. It is argued that the evidence is insufficient to justify the verdict. It is said that it fails to show any violation of duty on the part of the defendants, and does show that plaintiff was either guilty of contributory negligence, or assumed the risk. [6] As is usual in such cases, the evidence is not harmonious. The point at which the plaintiff was working at the time of the accident, as described above, was the face of the pillar. The testimony of plaintiff and his sons tended to show that they went to work at pillar 13, because they were ordered to do so by Fleming on December 20; that, being an experienced miner, the plaintiff knew that the place, not having been in use for some time, was dangerous; that he made no examination of the roof, except a visual inspection of it; that it appeared smooth and solid; that he directed his sons to clean the dirt from the floor in order to get it ready for props, which were necessary to support the roof when they began to remove the coal, and that he was engaged in superintending this work when the fall occurred. It tended also to show that, if props had been put in place before the plaintiff entered the room, the fall would not have occurred. The evidence on the part of the defendants tended to show that plaintiff had not been directed by Fleming to go

into room 13; that he knew of the rule, already mentioned, that no employee was allowed to go into an abandoned room to work, unless he was accompanied by the foreman or superintendent, and its condition ascertained and provision for its safety made; that it was not practicable to timber at the particular place where the fall of rock occurred, owing to the fact that, if timbers were put in, cars could not be gotten in to haul out the coal, and that the only way to render the place safe was by taking out such portions of the roof as, upon a test of them by sounding, appeared to be loose and ready to fall. One witness testified that a short time after the accident the plaintiff had stated that he himself had caused the fall of the rock by putting his pick into a crack which he had observed in it, to ascertain whether it was loose. This statement the plaintiff denied.

Upon this condition of the evidence, it was for the jury to determine whether the plaintiff had been directed to work in room 13; whether the defendants were thereupon reasonably diligent in taking the proper precautions to make it safe; whether, under the circumstances, the plaintiff was guilty of contributory negligence, or assumed the risk; and finally whether he caused the fall of rock by his own negligence.

Accepting plaintiff's story as true, he was justified in assuming that, having been ordered to go to work in room 13, the [7] defendants had in the meantime been reasonably diligent in making such inspection of it and such additions to the timbering as were necessary to guard his safety. Acting upon this assumption, though he was bound to observe, and protect himself against, such dangers as were open and obvious to his senses, he was not under obligations to make tests by sounding the roof to ascertain whether it was loose and likely to fall. (*Schroder v. Montana Iron Works*, 38 Mont. 474, 100 Pac. 619; *Thurman v. Pittsburg & Mont. C. Co.*, 41 Mont. 141, 108 Pac. 588.) The room as it was when he began work was a completed place. The obligation to take precautions to see that it [8] was reasonably safe when he went into it was upon the defendants. The duty to make it safe as the work wrought changes in it from time to time rested upon him; for the dangers

arising from the constantly changing conditions he assumed as incidental to his employment. (*Kelley v. Fourth of July M. Co.*, 16 Mont. 484, 41 Pac. 273; *Thurman v. Pittsburg & Montana C. Co.*, *supra*; *Shaw v. New Year Gold M. Co.*, 31 Mont. 138, 77 Pac. 515; *Friel v. Kimberly-Montana G. M. Co.*, 34 Mont. 54, 85 Pac. 734.)

It is argued that the evidence tends to show that the plaintiff was working, not as a servant of the company, but as an independent contractor, and hence that, since defendants owed him no duty as their servant, the evidence is insufficient to justify the verdict. There is no merit in this contention. The relation of the parties under a contract of employment is determined by an answer to the question: Does the employee in doing [9] the work submit himself to the direction of the employer, both as to the details of it and the means by which it is accomplished? If he does, he is a servant, and not an independent contractor. If, on the other hand, the employee has contracted to do a piece of work, furnishing his own means and executing it according to his own ideas, in pursuance of a plan previously given him by the employer, without being subject to the orders of the latter as to detail, he is an independent contractor. (1 *Shearman & Redfield on Negligence*, secs. 164, 165; *Poor v. Madison River Power Co.*, 38 Mont. 341, 99 Pac. 947; *Jensen v. Barbour*, 15 Mont. 582, 39 Pac. 906.) It appears that the plaintiff and his sons were employed to draw pillars, at seventy-five cents per ton. The sons being under age were not permitted to work, except under supervision of the father. The three, however, worked under the same rules and subject to the same control as the other miners. They were required to obey these rules and the directions of their superior officers; for, according to the evidence introduced by the defendants heretofore referred to, they were not permitted to go into a new place to work, until it had been inspected and put in a safe condition. Under these circumstances the plaintiff was a servant, and not an independent contractor. The stipulated price of seventy-five cents per ton was a mere means or standard for fixing the amount of his compensation. The compensation

of all other miners employed was fixed according to the same standard.

4. Contention is made that the court erred in many particulars in its instructions. Upon a comparison of the objections now urged, however, with those specified at the time of [10] the settlement of the instructions at the trial, we find that few, if any, of them were then called to the attention of the trial court, as provided by the statute. Such as were not so called to its attention may not be noticed. (Rev. Codes, sec. 6746.)

It is said that the first instruction was erroneous, in that it failed to submit to the jury the question whether the plaintiff assumed the risk, or was guilty of contributory negligence. The instruction told the jury, in substance, that if they found by a preponderance of the evidence that plaintiff was in the employment of the defendant company, that his injury was the result of a fall of rock, as alleged in the complaint, and that the fall was occasioned by the negligence or the want of care by the defendant, or any of its officers, the plaintiff having exercised "due care" upon his part, they must find the issues for the plaintiff. It is true that the plaintiff was not entitled to recover, if he was chargeable with negligence contributing directly to his injury, or if he assumed the risks incidental to the work he was engaged in. Nevertheless the court could not in a single paragraph cover every phase of the case. Nor is it to be presumed that the jury disregarded the subsequent instructions dealing with these defenses, and the [11] protection to which defendants were entitled under them. Construed together, the charge as a whole, in so far as the objection now urged affects it, fully covered those defenses and defined the duty of the jury in considering the evidence adduced in support of them.

It will be noticed that the instruction permits a recovery [12] against both Fleming and Hopka, without regard to whether the one or the other, or both, were guilty of the negligence alleged. Though both were employed by the company, both could not be held liable, unless they were jointly guilty of

negligence resulting in plaintiff's injury; nor could either be held, except for his own personal wrong. The company, if liable at all, is chargeable upon the principle of the maxim, "*respondeat superior.*" These defendants, its agents, can be held only for their individual wrongful acts or omissions within the scope of their employment. This objection was not urged at the time of the settlement of the instructions. Attention is called to it, however, because a new trial must be directed for errors hereafter stated.

Instruction No. 2 reads as follows: "If you find by a preponderance of the evidence in this case that it was the duty of the Bear Creek Coal Company, through its officers, to sufficiently timber room No. 13 described in the complaint, so as to make it reasonably safe for a passageway and place for its servants to be, who were ordered to and were engaged in drawing the pillar between room No. 13 and room No. 11, then its servants who were so ordered to go into room No. 13, for the purpose of drawing said pillar, and were engaged in, or about to be engaged in, removing said pillar, had the right to assume the master had done his duty in placing said room in a reasonably safe condition, and if you further find by a preponderance of the evidence that said room No. 13 was not in such reasonably safe condition, and that the plaintiff was thereby injured, without fault or neglect on his part, then you must find for the plaintiff in damages, not to exceed, however, the sum of \$25,000." The objection is made that this instruction assumes that plaintiff was ordered to go to work in room 13, and that he was there in the discharge of his duty at the time he was injured. Paragraph 7 of the complaint alleges that it was the duty of the plaintiff to go into room 13 while working under the command of the defendants. This is denied by the answer, and the defendants endeavored to show by their evidence that the plaintiff went into this room without direction, and in violation of a rule of the company, as heretofore pointed out. [13] In order to recover, it was incumbent upon him to show by a preponderance of the evidence that he was there in the course of his employment. Otherwise the defendants were un-

der no obligation to take precautions for his safety. The court in this instruction assumed this fact as proven, and thus took from the jury the principal issue in the case, which it was their exclusive province to try and determine. For this error the defendants are entitled to a new trial.

5. Defendants contend that the verdict is contrary to the law as declared in instruction 10, as follows: "The law required John Allen to use his natural faculties. Whatever he might have seen or discovered, exercising reasonable and ordinary care, he is supposed to have known. If he had an opportunity to ascertain whether the ground which fell on him was loose, his duty would not permit him blindly to venture under it without investigation. He was required to use his ordinary senses in places of danger, such as ground in a room that had not been worked for a considerable period, and if he failed to do so, and was injured by reason thereof, he cannot recover, even though you find the defendant had been negligent in not properly securing the ground; and if you believe plaintiff entered room 13 without sounding the roof and remained under the rock which fell upon him, or did not retire a safe distance therefrom, then he cannot recover in this action."

The plaintiff stated in his testimony that when he went to room 13 he merely looked at the roof, and, having observed that it was smooth and solid, set his sons to prepare the ground for the props necessary to be put in, and that he was directing them when the fall occurred. He stated distinctly that he did not sound the roof. As the account given by plaintiff and his sons was the only evidence showing the circumstances surrounding the accident, the jury must have believed them in order to [14] reach the verdict for the plaintiff. This being so, the evidence is directly contrary to the law as declared in the instruction. The question whether in such a case a verdict, though justified by the evidence under other instructions, should be allowed to stand was discussed in the early case of *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714. It was held that, though the instruction in question was erroneous, this court would not permit the verdict to stand, but would set

it aside and direct a new trial. The principle involved is that, except in prosecutions for libel, wherein the jury, "under the direction of the court, shall determine the law and the facts" (Const., Art. III, sec. 10), the court shall declare the law, and the jury shall determine the facts. The rule declared in that case has since been observed by this court. (*State v. Dickinson*, 21 Mont. 595, 55 Pac. 539; *King v. Lincoln*, 26 Mont. 157, 66 Pac. 836; *McAllister v. Rocky Fork Coal Co.*, 31 Mont. 359, 78 Pac. 595.) The instructions are the law of the case. The jury are bound to obey them; otherwise they must be regarded as the judges of the law, as well as of the facts, in all cases, with the result that the distinct functions of the court and jury are confused and destroyed.

It may be conceded that, as applied to the facts in this case, the instruction in question is fundamentally wrong, but this is not important; for, as was said in *King v. Lincoln, supra*: "A verdict found in disregard of the authoritative declaration of the court, made for their [the jury's] guidance, cannot be permitted to stand, whether the law thus declared be right or wrong." It was also held that the instruction would not be examined with a view of determining its correctness in point of law, but that a new trial would be ordered.

6. Finally, it is said that it is apparent from the record that the jury were influenced by passion and prejudice in awarding a verdict in the amount found by them. This contention [15] must also be sustained. The plaintiff at the time of the accident was fifty-nine years of age. His injury consisted in the loss of the third finger and a laceration of the palm of his hand to such an extent that the second finger was drawn and stiffened. As already stated, the physician who attended him testified that the tendons were intact, and that by a simple surgical operation the finger could be straightened, and the hand restored to comparative usefulness. This testimony is not contradicted. Nor is it controverted that, though plaintiff had the opportunity to have the operation performed, he refused to improve it. It is not definitely shown what his earning

capacity was prior to the injury; but it does appear that the gross earnings of himself and his two sons, for mining coal at the price of seventy-five cents per ton, had not during any one month, for several months, amounted to more than \$144. We shall not attempt a discussion of the cases in which excessive verdicts have been considered, or those in which a just result has been reached by scaling the award of the jury. In *Forquer v. North*, 42 Mont. 272, 112 Pac. 439, a verdict for \$10,000, for an injury to the left hand of a boy thirteen years of age, was reduced to \$4,000. This was done because, taking into consideration all the circumstances, we were of the opinion that the plaintiff was entitled to recover, and that this amount would compensate him for the pain suffered and the impairment of his hand. In this case, however, though the evidence is sufficient to go to the jury, we think the excessive award was due to passion and prejudice, rather than to an inadvertence of the jury in making their estimate. We think this is apparent from the fact that the uncontradicted evidence tends to show that the disabled condition of plaintiff's hand is due in part to his obstinate refusal to have it treated, as well as from the fact that under instruction No. 10 the jury were bound to have found for the defendants in any event. Their apparent disregard of the evidence referred to, coupled with a disregard of the instruction, which was tantamount to a direction of a verdict for the defendants, shows an apparent determination on their part to find a verdict for the plaintiff, without regard to the evidence.

Other questions are argued in the briefs; but what has already been said is sufficient to guide the court in a retrial of the case.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. DOLENTEY, RELATOR, v. REECE, RESPONDENT.

(No. 3,004.)

(Submitted April 24, 1911. Decided April 29, 1911.)

[115 Pac. 681.]

Mandamus—Jurisdiction—Supreme Court—Remand—Entry of Judgment—Clerk of District Court—Interest.**Appeal and Error—Jurisdiction of Court on Appeal—Remittitur—Effect.**

1. When a *remittitur* is issued by the supreme court on appeal, it loses jurisdiction of the case.

Same—Proceedings After Remand—Entry of Judgment.

2. Under Revised Codes, section 7120, providing that when judgment is rendered on appeal, it must be certified by the clerk of the supreme court to the clerk of the trial court, who must enter a minute of the judgment on the docket against the original entry, the practice of the clerk of the trial court of signing and recording a formal judgment, on receipt of a *remittitur* by the clerk of the supreme court, is proper, in the absence of any other legislative direction.

Same—Mandate of Supreme Court—Effect.

3. A mandate of the supreme court, reversing a judgment and remanding the case, with directions to enter judgment, must be interpreted in the light of the statutes governing the entry of a judgment after appeal, and the direction to enter judgment as directed must be construed as addressed to the clerk of the trial court.

Same—Judgment After Remand—Interest.

4. Under Revised Codes, sections 7172, 7173, relating to the cost on appeal after *remittitur* filed with a clerk of the trial court and requiring the clerk to include in the judgment any interest on the verdict or decision from the time it was rendered, the clerk, in the absence of specific directions as to interest, must include in the judgment directed by the supreme court interest from the date of the order of the supreme court to the time of entry of judgment; but no other interest may be included.

Original application for *mandamus* by the state, on the relation of W. B. Dolenty, against Frank L. Reece, clerk of the district court of the first judicial district, to compel the entry of a judgment. Dismissed.

Messrs. Walsh & Nolan, for Relator, submitted a brief. *Mr. T. J. Walsh* argued the cause orally.

In behalf of Respondent, there was a brief by *Messrs. McIntyre & McIntyre*. Oral argument by *Mr. H. G. McIntyre*.

MR. JUSTICE SMITH delivered the opinion of the court.

The district court of Lewis and Clark county, on February 17, 1909, in the case of *Dolenty v. Rocky Mountain Bell Telephone Company*, entered a judgment for the defendant; on appeal to this court, the judgment was reversed, and the following order entered: "Since there is not any dispute as to the facts of this case, a new trial is not necessary; but the cause is remanded to the district court, with directions to set aside its findings and judgment, and enter judgment in favor of the plaintiff for \$1,821.93 and costs." (*Dolenty v. Rocky Mountain Bell Tel. Co.*, 41 Mont. 105, 108 Pac. 921.) This order was made on April 18, 1910. On May 18, 1910, respondent's motion for a rehearing was denied. No motion was made in this court by the appellant for a correction of the order, or for a *nunc pro tunc* order providing for interest on the judgment. On May 23, 1910, a *remittitur* was filed with the respondent, clerk of the district court; on January 5, 1911, counsel for Dolenty presented to the respondent a judgment in the sum of \$1,821.93, with costs, and demanded, in effect, that it be entered as of February 17, 1909, so that it would draw interest from that date. The clerk refused to enter the judgment, whereupon this proceeding in *mandamus* was instituted to compel him to do so. The matter has been submitted on the pleadings.

When the *remittitur* was issued, this court lost jurisdiction [1] of the cause. (*Kimpton v. Jubilee Placer Min. Co.*, 16 Mont. 379, 41 Pac. 137, 42 Pac. 102.) Section 7120, Revised Codes, provides that, when judgment is rendered upon appeal, it must be certified by the clerk of the supreme court to the clerk with whom the judgment is filed, or the order appealed from is entered, and in cases of appeal from the judgment the clerk with whom the roll is filed must attach the certificate to the judgment-roll, and enter a minute of the judgment of the [2] supreme court on the docket against the original entry. The respondent complied literally with the mandate of this statute. However, in the absence of other legislative directions

on the subject, the practice of signing and recording a formal judgment, on receipt of the *remitititur*, by the clerk, has long been established, as we believe. Such practice appears to us to be legal and proper, and has a tendency to make the record certain and specific. We recommend its continuance.

While it is true that this court in the original case instructed the court below to set aside its former judgment and enter one [3] as directed, the mandate must be interpreted in the light of the statute laws governing the entry of judgment after appeal. The entry of judgment for the plaintiff would *ipso facto* vacate the judgment for the defendant, and the direction to enter judgment as instructed must be construed as addressed to the clerk. Our order was silent as to interest, and therefore it was the clerk's duty to enter such judgment as was authorized by law; the amount of the judgment, exclusive of interest, having been definitely fixed by this court. Section 7173, Revised Codes, provides that the "clerk must include in the judgment entered [4] by him, any interest on the verdict or decision of the court, from the time it was rendered or made." The preceding section relates to costs on appeal, after *remitititur* filed with the clerk below, and section 7173 may very well be construed as applying to judgments rendered or ordered by an appellate court. However that may be, we think it should, by analogy, be so applied as to make it the duty of the clerk below, in the absence of specific directions as to interest, to include in the judgment interest from the date of the order of this court to the time of entry.

As the respondent was without authority to enter the judgment tendered him, the proceedings are dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

DOHERTY, APPELLANT, *v.* NORTHERN PACIFIC RAILWAY CO., RESPONDENT.

(No. 2,970.)

(Submitted April 22, 1911. Decided May 1, 1911.)

[115 Pac. 401.]

Railroads—Carrier and Passenger—Regulations—Reasonableness—Duty of Passenger.

Carrier and Passenger—Regulations—Observance by Passenger.

1. The right of the purchaser of a first-class railroad ticket to proceed on his journey to his destination after he has entered a car in a train apparently ready to receive passengers is dependent upon his observance of all reasonable rules adopted by the carrier for the government of travel upon the character of train upon which he assumes to take passage.

Same—Rights of Carrier.

2. When the demands of business require it, a railroad company may run trains composed exclusively of sleeping-cars and exclude or remove therefrom all persons who have not provided themselves with berths or seats, under reasonable regulations, if the company has at the same time made provision to accommodate the public by running other trains at reasonable intervals.

Same—Regulations—Duty of Passenger.

3. The obligation rests upon one proposing to become a passenger upon a railroad train to inquire, when he purchases his ticket, as to the mode of travel provided and conduct himself accordingly; it is not incumbent upon the carrier to bring home to the passenger notice of its rules and regulations in that respect.

Same—Rules—Reasonableness—Question of Law.

4. Where the facts are not in dispute, the question of the reasonableness of a rule relative to the carriage of passengers sought to be enforced by a railroad company is one of law, exclusively for the court.

Same—Sleeping-cars—Rules—Reasonableness.

5. *Held*, that a rule that seat tickets, or half berths, on Pullman sleeping-cars, should not be sold to passengers boarding the train after a certain hour at night and before 7 o'clock in the morning was not unreasonable and arbitrary.

Same—Ejection of Passenger—When not Unlawful.

6. Plaintiff purchased a first-class railway ticket, and at 6 o'clock A. M. boarded defendant's train, composed entirely of Pullman sleeping-cars. The conductor, relying upon the rule set forth in paragraph 5, *supra*, demanded berth rate fare. Plaintiff, though willing to pay for half a berth, the price of a seat, refused to pay that asked and was put off the train at the next station. He brought suit and relied for recovery upon the unreasonableness of the rule. *Held*, that the district court properly directed a verdict in favor of defendant.

Appeal from District Court, Silver Bow County; John B. McClellan, Judge.

ACTION by E. J. Doherty against the Northern Pacific Railway Company. Judgment for defendant, and plaintiff appeals. **Affirmed.**

Messrs. Maury & Templeman, and Mr. J. O. Davies, for Appellant, submitted a brief. Mr. Davies argued the cause orally.

It is alleged in the complaint, admitted in the answer, proven by the plaintiff, and undisputed by the defendant, that the plaintiff, on the twenty-sixth day of July, 1909, purchased from the defendant a first-class railroad ticket from Butte to Missoula, with the intention of being transported from Butte to Missoula on train No. 15, the train from which he was ejected before reaching Missoula, and while at Warm Springs. Therefore, the relation of carrier and passenger existed between the plaintiff and the defendant prior to and at the time of the ejection. (4 Elliott on Railroads, sec. 1579.) The presumption then arises, and the law is, that plaintiff was then entitled to a seat in and to be carried on said train, from Butte to Missoula, without further charge. (Rev. Codes, secs. 5300-5303, 5347.) Under the above statement of law and facts, the plaintiff at the trial of this cause made out a *prima facie* case which entitled him to a judgment both as a matter of law and fact, and the burden then shifted upon the defendant to allege and prove facts showing that the ejection was lawful. (*Holt v. Hannibal S. T. J. Ry. Co.*, 174 Mo. 524, 74 S. W. 631; *Snellbaker v. Paducah T. & A. R. Co.*, 94 Ky. 597, 23 S. W. 509; *Daniels v. Florida Cent. & P. R. Co.*, 62 S. C. 1, 39 S. E. 762; *Central of Georgia Ry. v. Cannon*, 106 Ga. 828, 32 S. E. 874; 6 Thompson on Negligence, sec. 7707.) Appellant also insists that, under the above conditions, it was necessary for the respondent, before a judgment could be given in respondent's behalf, to allege and prove facts sufficient to support a judgment in its favor. (*Alywin v. Morley*, 41 Mont. 191, 108 Pac. 778.)

The question here presented for consideration is: Was it not the duty of the defendant and its servants, under the rules and

regulations introduced in evidence, to sell the plaintiff a seat in its train, and to accept from him the sum of seventy-five cents in payment thereof? After a diligent search we have been unable to find any authorities upon the question here involved. However, we insist that the ruling of the court in holding that as a matter of law it was not a reasonable hour in the morning to sell seat tickets, at 6:05 in the morning, under the circumstances disclosed in this case, is so clearly erroneous that it does not merit serious consideration. In Montana, daytime is the period of time between sunrise and sunset. (Rev. Codes, sec. 2032.) "Morning" has been judicially held to be from sunrise until 12 o'clock. (*Texas Mexican Ry. Co. v. Douglass*, 69 Tex. 694, 7 S. W. 77.)

Mr. Wm. Wallace, Jr., Mr. John G. Brown, and Mr. R. F. Gaines submitted a brief in behalf of Respondent. *Mr. Wallace* argued the cause orally.

"The purchase of a ticket entitling a passenger to carriage does not, at least where the railroad has provided ordinary and reasonable facilities for its passengers, entitle the passenger to travel in a sleeping-car without paying additional compensation, although such passenger may not have notice of the rules of the company." (Elliott on Railroads, sec. 1626.) The right to exact fare, whether Pullman, or ordinary train fare, rests on the same foundation. It is not a right to be enjoyed only by promulgation of regulations under section 5348, Revised Codes. Were that so, a regulation would be necessary before fare could be lawfully collected. That it is not is made clear, also, by the contrast found in the phrase "refuse to pay his fare or conform to any lawful regulation," found in section 5350. And, therefore, the matter of whether berth or seat fare shall be charged at 6:15 A. M. for Pullman accommodations is one that concerns the railway and Pullman companies alone —its reasonableness or unreasonableness being for them to decide. But if it were within the purview of section 5350, that section does not say that the regulations shall be either "posted

or published." It does say that the regulations must be "lawful, public, uniform in their application and reasonable." Both this section and the fare sections above quoted have been construed by the supreme court of California, in the case of *Ames v. Railway Co.*, 141 Cal. 728, 99 Am. St. Rep. 98, 75 Pac. 311; and it is there held that section 5350 does not demand either posting or publishing. Where the nature of a given regulation is undisputed, its reasonableness is held to be for the court and not the jury. (1 Elliott on Railroads, sec. 202, note; *Railway v. Motes*, 117 Ga. 923, 97 Am. St. Rep. 223, 43 S. E. 990, 62 L. R. A. 507; *Gregory v. Railway*, 100 Iowa, 345, 69 N. W. 532; *Montgomery v. Railway*, 165 N. Y. 139, 58 N. E. 770; *St. Louis Ry. v. Hardy*, 50 Ark. 134, 17 S. W. 711.) This must be so as otherwise one jury would declare a given regulation reasonable, while another would declare it not.

The evidence discloses that the Pullman rule prohibits seat sales after 10 P. M., and until a "reasonable time in the morning." By its terms this rule was subject to two exceptions: (1) "Special orders as to particular lines," and (2) "The rules of the road over which the cars are running." And the evidence showed a rule, by custom of operation on the Northern Pacific, fixing the morning hour—otherwise left indefinite by the rule—at 7 A. M. If this be a regulation, it was "lawful," because it violated no law. The seat furnishing statute, section 5347, was met, under the interpretation of the supreme court of California, by the second section of No. 15, and also by the fact that he was offered a berth, giving double accommodation. To hold that section 5347 meant a seat in a Pullman without other charge than regular train fare, would force the railways to give day coach accommodations only on all trains, and would destroy the Pullman car business altogether. It was "public" in that it was constantly and unvaryingly applied in the daily operation of the business; and it was "uniform in its application" because it was so applied to all alike, as well as "reasonable." (Rev. Codes, sec. 5348.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Plaintiff brought this action to recover damages for a wrongful expulsion from one of defendant's trains. The complaint alleges that on July 26, 1909, the plaintiff purchased from the defendant at Butte, Montana, a ticket from that place to Missoula, Montana; that he entered one of defendant's passenger trains, delivered the ticket to the conductor in charge, and was riding as a passenger on his way to Missoula; and that, before he reached his destination, the defendant, acting through its conductor, at Warm Springs station, without right and with force and violence and against plaintiff's will, with circumstances of indignity and by kicking or striking plaintiff with his knee, ejected him from the train, to his damage, etc. The answer admits the purchase of the ticket by plaintiff; that he entered upon the train as alleged; that he offered the ticket to the conductor; and that he was ejected from the train at Warm Springs, and denies all the other allegations of the complaint. It then alleges affirmatively that the expulsion of plaintiff was due to his own fault; that he entered a train consisting wholly of Pullman cars; that in order to ride thereon, in addition to the purchase of a regular first-class ticket, it was necessary to pay Pullman car fare; that, upon being advised by the conductor that his ticket could not be accepted unless he paid the Pullman fare, he refused to pay it, and that because of such refusal the defendant was forced to stop its train and expel him therefrom. Upon these allegations there was issue by reply. At the trial, the hearing of the evidence being completed, the court sustained defendant's motion for a verdict in its favor. The appeal is from the judgment entered thereon.

The grounds of defendant's motion are: that the complaint fails in several particulars to state a cause of action, and that the evidence is insufficient to make a case for the jury. For the purposes of this decision, we shall assume that the complaint states a cause of action, and consider only the question whether the action of the court in directing a verdict was cor-

rect. Plaintiff does not now claim that upon his expulsion from the train he was subjected to maltreatment of any kind. His contention is that the wrong done him was the violation by the defendant of his right to continue his passage after it was begun by requiring him to leave the train. We shall also therefore eliminate consideration of the evidence showing the manner of plaintiff's expulsion, and examine that only upon which he bases his contention that the court erred in directing a verdict for the defendant. The evidence shows the following:

On July 26, 1909, the plaintiff and others purchased from defendant at Butte first-class tickets from that place to Missoula intending to take defendant's train known as No. 15. This train was divided into two sections. The first was made up exclusively of Pullman sleeping-cars. The day coaches were in the second section. The two sections were scheduled as one train. The first section arrived at Butte about 6 o'clock, some two hours and a half after daylight, and left a few minutes later. The second section usually followed after an interval of twenty-five minutes. On this morning it followed thirty or forty minutes later. When the first section arrived, the plaintiff, with six or seven others bound to the same destination, sought to enter it. A porter employed on the train, standing at the entrance of the car, told them that there was room for five more passengers only, and would not permit more than five to enter, though others attempted to do so. Among the five was plaintiff. The other four were strangers to him, and it seems had not met each other before that morning. When the conductor came to collect their Pullman fares, the following took place:

Plaintiff testified: "The Pullman car conductor came along and says: 'Do you gentlemen want this drawing-room?' And one of the gentlemen spoke up and says: 'How much is it?' He says: 'Six dollars.' He says, 'Haven't you got some other place to sit besides here? That's pretty steep.' He says: 'I can give you berths. A dollar and a half for two.' He says: 'That will be six bits apiece?' He says: 'Yes.' He went away and after awhile he came back, and says: 'If you want berths, dig

up.' They started to give him six bits apiece. He took it and came to me, and he wanted a dollar and a half from me. I says: 'What do you want a dollar and a half from me for?' He says: 'Because you haven't got anybody with you.' I says: 'I will pay six bits, like the other gentlemen, but I won't pay a dollar and a half.' He says: 'You will pay a dollar and a half or get off.' I says: 'You took six bits from four different men in front of me, and you want me to pay as much as two of them.' He says: 'Well, you'll get off at the next station.' So the conductor came along and took up the tickets, and he told the conductor: 'This fellow won't pay for a berth.' So the conductor took and punched my ticket and marked it, with an indelible pencil, 'R25' or '26,' I don't know which. So, when we got along toward Warm Springs, he flagged the train. There were three of us sitting in a seat together. I was the last one of the three. The conductor asked me if I would pay a dollar and a half. I said: 'No; but I will pay six bits.' So he reached over and grabbed hold of me, and dragged me out of the seat, and started me ahead of him along through the aisle, or whatever you call it, and pushed me out onto the platform, and they had the vestibule open. I placed my hands against the side of the car, like that [illustrating], and he started pushing me down, and he pushed me off anyway, and I won't say whether he kicked me with his foot or gave me a punch with his knee, but he got me in the ribs, anyway, and put me off the train. It was a good stiff jolt in the ribs. When I speak of 'six bits,' that is the ordinary commonplace expression for seventy-five cents. * * * The Pullman conductor first asked if our party, consisting of we men in there, wanted the drawing-room; and he was then asked by some one of the party how much it was, and stated, 'Six dollars.' Then he was told that that seemed rather high, and couldn't he give them some other accommodation. The train pulled out of here about five minutes after 6 or at 6 o'clock in the morning—close to 6, probably a little after. The curtains were down on some of the berths, but there was two or three seats probably in the center of the car that was open. Then the conductor said he

could sell a berth for a dollar and a half for two. He said: 'Six bits apiece.' As to whether he said that or some of the men said that would be six bits apiece, they asked him if that would be six bits apiece, and he said, 'Yes.' His statement was that he could sell a berth for a dollar and a half. * * * He never said no such thing as that the party could pair off as they wanted to. He didn't say that. I apparently was the last person to collect from. The others paid six bits apiece. He collected six bits apiece from four men. He then had pay for two berths. Then he told me that I would have to pay a dollar and a half. He told me that was the price of the berths. I insisted that I should be carried for the price that each of the other men had paid. That was the controversy between us. I said I would pay six bits, just the same as the others, and he told me that I would have to pay the price of a berth. He didn't go and get the train conductor then. The train conductor come along. He never left there. The train conductor arrived. Down to that time, I had had my train ticket—my passage ticket. I gave the passage ticket to the train conductor—offered it to him. The Pullman car conductor said: 'This fellow won't pay a dollar and a half for a berth.' The train conductor asked him if he wanted me put off. He said: 'Yes,' if I didn't pay a dollar and a half. I told the train conductor I would only pay seventy-five cents, what each of the other men had paid. That was the actual difference between us. * * * I just sat there, and he reached over and pulled me out. When he said, 'Come on, get out of here,' I sat there. I didn't intend to go voluntarily. I sat there after he told me to, 'Come, get off,' until he took two steps to put me off; and I meant to 'put it up to him' to put me off the train, if I was to be put off. That was my purpose. I stepped down on the steps of the platform when he pushed me. When I got out on the car platform, he asked the Pullman car conductor that was down below, 'Do you want this man put off?' The Pullman car conductor was standing on the ground, and the railroad conductor says, 'Do you want this man put off?' He says, 'Yes; unless he pays a dollar and a half.' I says: 'I won't pay a

dollar and a half. I will pay six bits like the others.' We were right on the platform. I was maintaining my position, and they were maintaining theirs. The question was whether I should pay seventy-five cents or a dollar and a half. That was the point in dispute." Plaintiff stated in other portions of his testimony that he knew that he was in a Pullman car and had ridden in such a car often.

Hoyt, the train conductor, called by defendant, testified: "I am familiar as train conductor with the rule of business as it was carried on as to when they exact seat fare and when they exact berth fare. After 7 o'clock in the morning it is seat fare. Anything before that it is berth rate. The berth rate is \$1.50 between Butte and Missoula. When I got into this drawing-room, I learned who it was that wouldn't pay the fare by the Pullman conductor showing him to me. I explained to him in regard to the way the fares was collected, and what we would have to do if he wouldn't pay it. I would mark his ticket off at Warm Springs, and he could get the second section with day coaches, which would make a difference of about forty minutes to Missoula. It was between thirty and forty minutes behind us, and I told him that. This took place after we were out of Butte about fifteen minutes. * * * I told him before 7 o'clock in the morning it was berth rate; and, if there were two men together, the two could stay in the berth and pay the fare between them; but where there was only one, he had to pay full fare. He said he would pay but seventy-five cents; that is, what the rest of them paid. He said he had a first-class ticket, and he was going to ride on it. I told him he couldn't ride on a first-class ticket without Pullman transportation. I told him I would mark his ticket, and I did. After so marking the ticket, I canceled it once and handed it back to him, and he accepted it. The train at this time was just coming into Warm Springs."

The witness Baysoar, agent of the defendant at Butte, testified: "I was familiar with the method of selling seats and berths in Pullman cars as they prevailed in the regular course of business in July of last year. They ceased selling tickets at night to any point reached by the train after 10 o'clock P. M. In the

regular course of business, the sale of seats in Pullman cars would be resumed at 7 o'clock in the morning of the next day. In that interval between 10 P. M. and 7 A. M., there is nothing in the way of accommodations in Pullmans but berths on sale, aside from the drawing-room. We never in the course of business sell half berths. We couldn't do that. Two adults could occupy a berth when a berth was purchased. That is the limit for adults." As an exhibit to his testimony there was introduced a rule relating to the Pullman car service, which he stated was the only rule of the defendant and the Pullman company upon the subject. The portion of this rule which is material here is the following: "Ticket agents and conductors must conform strictly to tariff in the sale of accommodations and to the instructions contained herein. (a) Seats in sleeping cars will be sold from stations passed after a reasonable hour in the morning, where such sales will not discommode berth passengers; but will not be sold to stations passed after 10:30 P. M., or before a reasonable time in the morning, except by special orders as to particular lines, or where a car is due to arrive at terminus by midnight. This rule will not apply to observation, composite, library or club cars, in which seats may be sold during the night, when such sales do not interfere with the sleep of a passenger or conflict with the rules of the road over which the cars are running. Seat passengers will not be located in space of berth passengers." It appears, further, that the train conductor by virtue of his general power of control over the train had authority to eject passengers from Pullman cars when they refused to pay their fare or refused to comply in other respects with the rules governing the use of them by passengers, though it does not appear definitely whether the defendant was running the Pullman cars on its own account, or was running them by some traffic agreement with the Pullman company. In any event, it is not questioned that in ejecting plaintiff he was acting within the scope of his employment as the servant of the defendant.

It may be conceded, as counsel for plaintiff contend, that, having purchased a first-class ticket and entered a car apparently [1] ready to receive passengers, plaintiff thereby became a

passenger and was thereafter entitled to all the rights and privileges appertaining to his relation to defendant as such, among which was his right to proceed on his journey to his destination (Elliott on Railroads, sec. 1579); but to this concession must be attached the reservation that the continuance of his right was conditional upon his observance of all reasonable rules adopted by the defendant to govern travel upon the character of train upon which he had assumed to take passage. "A common carrier is entitled to a reasonable compensation, and no more, which he may require to be paid in advance. If payment thereof is refused, he may refuse to carry." (Rev. Codes, sec. 5337.) "A common carrier may demand the fare of passengers either at starting or at any subsequent time." (Section 5349.) Again: "A common carrier of persons may make rules for the conduct of his business, and may require passengers to conform to them, if they are lawful, public, uniform in their application, and reasonable." (Section 5348.) So, too, where a railroad company has provided ordinary and reasonable facilities for its passengers, the purchase of a ticket entitling a passenger to carriage over the railroad does not entitle him to travel in a sleeping-car without paying additional compensation, even though he may not have notice of the rules of the company. (4 Elliott on Railroads, sec. 1626.) In such case the company is within its rights when it removes the passenger to a car in which are provided the accommodations for which he has paid, if it is done without unnecessary force. It seems apparent, also, that, when the demands of business require it, a railroad company may run [2] trains composed exclusively of Pullman sleepers, and exclude or remove therefrom all persons who have not provided themselves with berths or seats, as the case may be, under reasonable regulations, if it has at the same time made provision to accommodate the public by other trains running at reasonable [3] intervals. In such case, it is not incumbent upon the company to bring home to the passenger notice of its rules. The obligation rests upon the person proposing to become a passenger to inform himself when he purchases his ticket as to the mode of travel provided and to conduct himself accordingly. (Ames

v. *Southern Pac. Ry. Co.*, 141 Cal. 728, 99 Am. St. Rep. 98, 75 Pac. 310.) By inquiry the plaintiff in this case would have ascertained that a train fully equipped with day coaches was due in a few minutes. Indeed, we are justified by the evidence in assuming that he was informed that the train he entered was composed of sleeping-cars, and he must be presumed to have known that an additional fare would be exacted; for he stated that he knew that he was in a Pullman, and had often traveled in such cars. That an additional fare will be exacted in such cases is a matter of common everyday experience and observation.

The integrity of the judgment in this case, therefore, is to be determined by answer to the inquiry: Was the rule in question a reasonable one? The statements of the different witnesses agree in all essential particulars. The facts are not disputed. [4] Therefore, the question of the reasonableness of the rule was exclusively one for the court. (1 Elliott on Railroads, sec. 202, and cases cited; *Central of Georgia Ry. Co. v. Motes*, 117 Ga. 923, 97 Am. St. Rep. 223, 43 S. E. 990, 62 L. R. A. 507.) The purpose of the rule is apparent. Pullman sleeping-cars in ordinary use are intended to, and do, answer two purposes, *viz.*, to furnish to passengers who desire and are willing to pay for them berths for sleeping purposes at night and for superior comfort and convenience and liberty of movement during the day, and to afford to day passengers the same convenience and comforts which are extended to berth owners during the day. The second purpose is subordinate to the first, since it is incumbent upon the railroad company to require both its employees and passengers to observe such rules and regulations as will permit the owners of berths to enjoy both their day and night privileges. It is imperative that they shall not be unreasonably crowded during the day, and that beyond a reasonable hour in the evening, and a reasonable hour in the morning, they shall not be disturbed by the noises incident to the coming and going of seat passengers. It is entirely in accord with common experience and observation that the usual hour for retirement to

rest in the evening is not far from that fixed in the rule, after which seats may not be sold, and that the period of eight and one-half hours, the time set apart for that purpose, is not beyond what is reasonably necessary for the physical health and well-being of the average man. Besides this, such privacy as may be had in the absence of day passengers for preparation to retire and for the morning toilet, is, in the opinion of the average person, indispensably necessary. In view of these considerations, [5] we do not think the rule unreasonable and arbitrary; even though in the month of July in this latitude daylight comes two and one-half hours earlier than 7 o'clock in the morning, and even though the plaintiff and his associates did not wish to go to bed. It is not unreasonable that persons situated as were the plaintiff and his companions, though permitted to enter the car, should be subject to the rules incident to night travel, and pay the price fixed for the accommodation during the hours set apart for that purpose. To hold otherwise would require railroad companies to lengthen or shorten these hours according to the accidents of the seasons, or to vary them at the whim of individual passengers.

Under the rule as interpreted by the Pullman conductor, half berths could not be sold, but one berth could be sold to two persons. His sale of berths to the four other passengers as he did, allowing each to pay one-half the price, was a compliance with the rule as he interpreted it. It was a question between him and his employer whether he correctly interpreted it. He was clearly within its reasonable requirements in demanding the berth rate from the plaintiff; and the plaintiff had no right to complain that he was not so situated that he could join with some one else in the purchase of his accommodations and obtain them at the same price as the others. But counsel say that defendant is chargeable with putting him in that position, because it is apparent that, if there were accommodations for five persons, there were for six, and but for the action of the porter in charge in excluding other passengers he would have obtained his accommodations at the same price as the others.

Under the cause of action alleged in the complaint, however, we do not think the plaintiff is entitled to recover because of the mistake made by the porter. The conductor in collecting the fares obeyed the rule as he was allowed to interpret it. He would not have been justified in modifying the rule in order to accommodate plaintiff. Nor do we think that a porter whose duties ordinarily are those of a domestic servant had the authority to modify it for him. There is nothing in the record tending to show that he had such authority, nor, in so far as we may assume knowledge as to the character of his duties, may we infer that he had such authority. In his controversy with the conductor, the plaintiff did not rely upon the information given him by the porter. He did not claim that the porter misinformed him. His claim was that the rule was unreasonable.

The judgment is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE SMITH: The plaintiff claims that technically he has a cause of action against the Northern Pacific Railway Company, and the latter has interposed a purely technical defense. It invokes a rule of the Pullman company to the effect that no seat tickets shall be sold before a reasonable hour in the morning, and its employees have testified that such reasonable hour has been fixed at 7 o'clock—by whom it does not appear. Plaintiff and six other persons, all apparently strangers to each other, desiring to ride from Butte to Missoula, boarded a solid Pullman train at about five minutes after 6 o'clock on a bright morning in midsummer. He knew that he was boarding a Pullman car, and that he would be obliged to pay extra for the privilege of riding thereon. The porter at the step of the car allowed him and four other men to get aboard, turning others away, because, as he said, he had room for but five. What reason is there for supposing that the porter was not acting within the scope of his duty and authority when he allowed five men to board the car? If he had room for five, he certainly had room for six. That there was ample seat room for six is not disputed.

Assuming, for a moment, that the rule is a reasonable one (on paper), it is a familiar principle of law that it should be applied and interpreted in the light of all the surrounding facts and circumstances. In this case, a most important fact is that the Pullman company, through its servants, created the peculiar situation in which the plaintiff found himself. The majority opinion quotes the testimony at length. Can any reasonable man suppose for a moment that any of the five passengers desired to go to bed or to purchase a half berth? Certainly not. No such claim is made. Each wanted a seat, and that is exactly what the first four got. It is a mere subterfuge to pretend that these strangers were buying berths to be occupied, as such, for about three-quarters of an hour. Had the plaintiff complied with the rule and paid \$1.50 there would have been an empty seat beside him which the Pullman company had received payment for, but which could not be occupied. The Constitution and statute laws of this state expressly prohibit discrimination under such circumstances as are disclosed by this record. Can it be said that the sleeping-car company received the plaintiff upon an equal footing with those who accompanied him into the car? But it is claimed that the rule is accountable for the result. Are rules promulgated for the embarrassment and annoyance of the traveling public? Are they so fixed and inflexible as to be sacred and unchangeable? Can discrimination be indirectly practiced by virtue of them? Can the Pullman company, in effect, violate the very spirit of its own rule and escape liability on the ground that there has been a technical compliance with the terms thereof? I think not. The argument that the Pullman car conductor correctly interpreted the rule because he would have been discharged had he placed any other construction upon it, does not appeal to me as having any force. Let us look at this situation from a standpoint of common sense. Let us suppose that, instead of invoking the fiction that the first two passengers desired to occupy a berth together and the second couple likewise, the Pullman car conductor had said to them: "Gentlemen, I see you desire seats, but I cannot sell a seat, as such, until 7 o'clock. However, there is plenty of room here, so sit down, and at 7

o'clock I will collect a seat fare of seventy-five cents from each of you." Would the rights of this public service corporation, the Pullman company, have been violated? Would it have lost any money which rightfully belonged to it? Or let us suppose he had said to Doherty: "In your case, as you are an odd man here, I cannot carry out the counterfeit notion that you desire to go to bed at this time in the morning, having slept all night; so, therefore, desiring to accommodate you as one of our patrons and one of the great traveling public, I invite you to occupy one of these empty seats for three-quarters of an hour, at the expiration of which time I will call upon you to pay me the sum of seventy-five cents, the same amount paid by those who boarded the car with you." Would any money have been lost to the Pullman company by such a course of conduct? Rather, would such courteous, polite and novel treatment not have been calculated to induce the public to travel in its cars whenever possible, and thus enhance its revenues? Perhaps the conductor would have been glad to extend such a courtesy, but the answer is that he would have been discharged had he done so. I recognize no rule as reasonable which can be so manipulated as to embarrass the traveling public under circumstances where the exercise of a little common sense, and regard for the comfort and welfare of others, would make it possible to accommodate them and avoid causing them humiliation.

But this plaintiff is entitled to very little sympathy. He may have a technical cause of action against the Northern Pacific Railway Company for purely nominal damages. He said on the witness-stand: "I meant to 'put it up to him' to put me off the train if I was to be put off. That was my purpose." When he found himself confronted with a rule of the Pullman company which the conductor had no authority to change or modify, or even to construe reasonably, without jeopardizing his position, or, as he himself said, "losing his job," he might have paid the extra seventy-five cents under protest and recovered it later, if wrongfully paid. Or he could have left the train quietly at Warm Springs, taking the second section forty minutes later, without substantial loss. He did in fact ride to Missoula, on

the second section, using his original railroad ticket for that purpose. In the affairs of life these little misunderstandings and annoyances are bound to occur. They ought not to be magnified into lawsuits unless some substantial injury has been suffered. It is unfair to the taxpayer that his money should be frittered away in the maintenance of courts for the purpose of hearing such controversies. While the Northern Pacific Railway Company, like every other corporation and individual, should be compelled to make full compensation for all injuries occasioned through its negligence, it ought not to be annoyed and harassed with lawsuits which have no substantial merit solely on account of the fact that it is a corporation. For the reasons herein stated, I do not dissent from the disposition of the case.

**FEATHERMAN ET AL., RESPONDENTS, v. HENNESSY ET AL.,
RESPONDENTS; MORSE, APPELLANT.**

(No. 2,937.)

(Submitted May 9, 1911. Decided May 18, 1911.)

[115 Pac. 983.]

Water Rights—Change of Use—Power and Agricultural Purposes—Date of Appropriation—Trial—Findings—Exceptions—Review.

Trial—Defective Findings—Exceptions—Review.

1. A party who fails to make exception in the district court to findings claimed by him to be defective, and to have the exception reserved in a bill of exceptions, may not complain of such defect on appeal.

Water Rights—Indefinite Findings—Appeal—Party Aggrieved—Harmless Error.

2. The court in a water right suit found appellant to be entitled to the use of a certain number of inches of water for "about two weeks in June" of each year. *Held*, that though the court's failure to specifically ascertain the portion of the month to which appellant's use was to be confined rendered the finding vague and indefinite, appellant was not aggrieved, since he was left to his own choice in selecting the time of use, during the month of June, so long as he did not exceed the limit of two weeks, the lack of definiteness thus not working to his injury.

Findings—To be Construed Together.

3. All findings of the court must be construed together, and, if possible, such construction be given them as will sustain the decree; other-

wise a general finding, when inconsistent with a specific one, must be rejected and the decree held to be supported by the latter.

Water Rights—Change of Diversion and Use Permissible, When.

4. An appropriator of water may change the point of his diversion or use it for purposes other than that originally intended for it, provided the change does not affect injuriously the rights of subsequent appropriators.

Same—Change of Use from Power to Agricultural Purposes—Effect on Date of Appropriation.

5. Appellant appropriated 1,500 inches of water for power purposes in 1883. In 1905 he changed the use of ninety inches thereof from power to agricultural purposes, which changed use resulted in a consumption of the quantity so diverted. Held, that under these circumstances the change of use amounted *pro tanto* to a new appropriation, and that therefore the right to use such amount must bear the date at which the change from the original purpose was made, *i. e.*, 1905.

Appeal from District Court, Granite County; Geo. B. Winston, Judge.

ACTION by John A. Featherman and others against D. W. Hennessy, George W. Morse, and others. From a decree for plaintiffs, defendant Morse appeals. Affirmed.

Mr. Geo. A. Maywood submitted a brief and argued the cause orally, in behalf of Appellant.

Messrs. Rodgers & Rodgers, Mr. W. L. Brown, Mr. Josiah Shull, Mr. J. H. Duffy, and Mr. W. E. Moore submitted a brief in behalf of Respondents. Oral argument by *Mr. Hiram Rodgers* and *Messrs. Shull and Moore*.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by plaintiffs against thirty-six defendants, including appellant herein, to have adjudicated the rights of the parties, respectively, to the use of the water flowing in Flint creek, in Granite county. Appeals by the defendant James McGowan, from the decree and an order denying his motion for a new trial, have heretofore been heard and determined. (See *Featherman v. Hennessy*, 42 Mont. 535, 113 Pac. 751.) Reference is made to the opinion delivered on those appeals, for a statement of the issues tried. In his answer the appellant claims

rights under separate appropriations, of different amounts at different dates, from April 1, 1870, up to October 6, 1883. No complaint is made of the action of the court in determining any of them, except the last, which consists of 1,500 inches, alleged to have been appropriated by appellant and one Dunkelberg on the date last mentioned, for the purpose of furnishing power to operate a gristmill, then owned by appellant and said Dunkelberg, but now, together with the water right, owned exclusively by the appellant, and to irrigate certain lands belonging to the appellant. So far as they concern this right, the findings and conclusions of the court are the following:

"Finding No. 1. * * * That each of the plaintiffs and each of the answering defendants herein, and they and each of their grantors and predecessors in interest, have since the respective dates of the several appropriations mentioned in these findings to the present time used the amounts of water mentioned in these findings, and which are found to have been appropriated and diverted by them and each of them, respectively, for irrigating their several lands and for mining, domestic and other useful purposes, and the use of said waters to the amount stated was and is necessary for the purposes mentioned. * * *

"Finding No. 49. * * * That on or about the 6th day of October, 1883, the defendant George W. Morse and his grantors and predecessors in interest appropriated and diverted from said Flint creek, by means of a ditch of sufficient capacity to carry the same 1,500 inches of the waters of said Flint creek, for the purpose of running a flourmill and a mill for chopping feed; and that said mill has since said time been operated by the said defendant George W. Morse about two weeks in June of each year, and in the months of September and October of each year. That the said waters so appropriated and diverted on October 6, 1883, were not appropriated or diverted or used for any other purpose than for operating said flourmill and mill for chopping feed; and after said use said waters flowed back into said Flint creek a very short distance below said mill, except that on or about April 1, 1905, the said defendant diverted and used about ninety inches of the said 1,500 inches of water for the purpose

of irrigating certain lands belonging to him and described in his answer herein. And the use of said water must be confined in the future to such purposes and to the manner and times in and at which it has heretofore been used except that such may be changed to some other without injury to any other party to this action. When the said George W. Morse is not using said water for the purpose of operating said mill, the said 1,500 inches of water so appropriated and diverted by him shall be available to any and all junior appropriators on said creek, excepting said ninety inches used by said defendant for irrigating his said lands, which said ninety inches of water the said defendant is and shall be entitled to for irrigating his said lands and as of date April 1, 1905.

"Conclusions of Law. * * * 50. That the defendant George W. Morse, for the purpose of irrigating his said land and for other useful and beneficial purposes, is the owner and entitled to the use of 1,500 inches of the waters of said Flint creek as of the date of October 6, 1883, for the purpose of operating the mill mentioned in findings of fact No. 49. Reference is hereby made to said finding of fact No. 49 for the purpose of making it part of this conclusion of law No. 50, and for a more particular statement of the rights of said defendant Morse, and the manner and extent of his ownership and use of, in and to the said 1,500 inches of the waters of said Flint creek."

The decree is in conformity with these findings and conclusions, and declares the restrictions subject to which all the parties are entitled to the use of the amounts awarded to them. It requires the appellant to limit the use of the 1,500 inches awarded to him subject to the rights of prior appropriators, to the times specified in finding 49 and exclusively for the purpose of generating power for his mill, except that, subject to a like restriction in favor of other rights used for agricultural purposes, he is permitted to use ninety inches of this amount for agricultural purposes, dating the initiation of this right on April 1, 1905. The appeal is from the decree.

Contention is made that finding 49 is indefinite and uncertain by reason of the use of the word "about," with reference to the

time in the month of June of each year during which appellant's use may continue, and hence is defective. It is also said that the finding is defective in that it does not designate what two weeks in the month of June the use may be had. There was no motion for a new trial. The record contains no bill of exceptions showing any objection to the findings, or request to have them amended in any particular. It consists of the judgment-roll alone. Section 6766, Revised Codes, declares that in no case shall a judgment be reversed for want of findings unless they shall have been requested as therein provided; and that when a case has been tried by the court, the judgment shall not be reversed on appeal for defects in the findings, or any of them, unless exception be made in the trial court because of such defect and the exception reserved in a bill. Section 6767 points out the mode by which the exception must be brought into the record. While it is incumbent upon the trial court in every case tried without a jury to make findings, unless they are waived by the parties (Rev. Codes, secs. 6763, 6765; *Bordeaux v. Bordeaux*, 43 [1] Mont. 102, 115 Pac. 25), yet the party who fails to pursue the course pointed out in sections 6767, *supra*, and 6768 cannot complain either that the duty enjoined by section 6764 has been omitted, or that the result of an effort to perform it is defective. (*Grogan v. Valley Trading Co.*, 30 Mont. 229, 76 Pac. 211; *Gallagher v. Cornelius*, 23 Mont. 27, 57 Pac. 447; *Bordeaux v. Bordeaux*, *supra*.) Therefore, though it be conceded that the finding is defective in the first particular complained of, the decree may not be reversed for this reason, if by any reasonable construction the finding supports it.

The word "about," used in connection with expressions of distance, number, etc., ordinarily signifies "nearly, approximately, almost." (Century Dictionary.) In the same connection, too, it is sometimes construed to mean "not exceeding." (*People ex rel. Bettner v. City of Riverside*, 70 Cal. 461, 11 Pac. 759; *Simpson v. New York etc. R. Co.*, 16 Misc. Rep. 613, 38 N. Y. Supp. 341; 1 Words and Phrases, 25.) When used in statements of courses and distances, if there are no other

words rendering it necessary to retain it, it is discarded as without significance, and the course or distance, as the case may be, is taken as positively stated. (1 Words and Phrases, 21, 23, and citations.) Evidently the court intended to fix a definite time during and not to exceed which the use might continue, in the month of June; for no other words are used indicating that the intention was to state the time by way of estimate. Rejecting this word as without modifying force, the finding is made sufficiently specific as to the length of time. That the court did not [2] specifically ascertain the portion of the month to which appellant's use had theretofore been confined renders the finding and provision in the decree based thereon vague and indefinite; but appellant is not aggrieved by it, and hence is not in a position to complain. He is left to his own choice to select the time of use, subject only to the proviso that he does not exceed the limit of two weeks. The owners of subsequent rights on the stream above the point of appellant's diversion might well insist that they cannot ascertain definitely during what portion of the month they must refrain from diverting water through their ditches, and thus avoid a violation of the injunction feature of the decree. This lack of definiteness does not affect the appellant, and, since the owners of these subsequent rights do not complain, this court must presume that they are satisfied with the findings as they stand.

Complaint is made that paragraphs 1 and 49 of the findings quoted are inconsistent in that, in paragraph 1, the court found in effect that appellant has since the date of his appropriation used his right continuously, whereas in paragraph 49 the use is limited to specific months during the year; and in that the use of ninety inches for agricultural purposes is found to have been initiated on April 1, 1905, thus postponing this amount of the right in point of time for twenty-two years, whereas it should have been assigned the date of the original appropriation. If we understand appellant's counsel, his argument is that because of this inconsistency the findings do not furnish support to the decree. There is no inconsistency in the findings. Paragraph

1 is a general introductory finding, applicable to the rights of all the defendants, and is to be construed with the specific findings. Standing alone, it would be meaningless, because it does not make specific mention of any particular right, and becomes intelligible only when read in connection with the specific finding as to each separate right, including that of appellant described in paragraph 49. It might have been omitted altogether without affecting the sufficiency of the specific findings, which furnish ample support for the decree, even though it be conceded that these findings are inconsistent with it, as appellant insists. All of the [3] findings must be construed together, and, if possible, such construction be given them as will sustain the decree; otherwise a general finding, inconsistent with the specific finding, must be rejected and the decree held to be supported by the specific finding. (*Larkin v. Upton*, 144 U. S. 19, 12 Sup. Ct. 614, 36 L. Ed. 330.) What the facts are as shown by the proof, with reference to the use of the appropriation in question, of course we cannot know; but having found the facts as stated in paragraph 49, the court properly limited the use to the time and purposes for which appellant had made his appropriation and theretofore used it, subject to such changes only, as to the purpose and place of use, as could be effected without infringement of the rights acquired by others pending such use.

The right to the use of water in the streams of this state is public. "As between appropriators, the one first in time is first in right" (Rev. Codes, sec. 4845); but when the first appropriator has finished his use he must return the water to the stream, to be used by subsequent appropriators (Rev. Codes, sec. 4844). [4] But though he may change the point of diversion or may use it for other purposes, his right to do so is subject to the well-settled rule that the change may not affect injuriously the rights of subsequent appropriators. (*Gassert v. Noyes*, 18 Mont. 216, 44 Pac. 959; *Head v. Hale*, 38 Mont. 302, 100 Pac. 222; Kinney on Irrigation and Water Rights, sec. 234; Rev. Codes, sec. 4842.) Upon the facts found in paragraph 49 and in the conclusion based thereon, the court properly limited the original appropria-

tion to the purpose of generating power, with the right to change this use so as not to infringe upon the rights of others.

The use of ninety inches for agricultural purposes was found [5] to have been initiated on April 1, 1905. This was a change of the original use and resulted in a consumption of the quantity so diverted to the new use, and therefore amounted *pro tanto* to a new appropriation. Such being the case, under the rule above stated, the court reached the proper conclusion, to-wit, that the right to use this amount for this purpose must bear the date at which the change was made.

There is some doubt, upon the record before us, whether or not all the adverse parties were properly served with the notice of appeal. In their brief counsel for respondents have submitted a motion to dismiss the appeal for this reason. The conclusion we have reached renders it unnecessary to consider and determine this motion.

The judgment is affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

LYNES, RESPONDENT, v. NORTHERN PACIFIC RAILWAY
CO. ET AL., APPELLANTS.

(No. 2,901.)

(Submitted May 8, 1911. Decided May 20, 1911.)

[117 Pac. 81.]

Personal Injuries—Master and Servant—Railroads—Complaint—Insufficiency—Contributory Negligence—Evidence—Costs—Mileage of Witnesses.

Personal Injuries—Master and Servant—Railroads—Contributory Negligence—Complaint—Insufficiency.

1. Under the rule that where plaintiff's own act is a proximate cause of a personal injury for which he seeks to recover damages, he must

allege (and prove) that he acted as a reasonably prudent person would have done under like circumstances, *held*, that the complaint of a locomotive engineer which alleged that, fearing a collision, he jumped from his engine and was injured, but failed to disclose the necessary facts to negative the presumption of negligence on his part in acting as he did, did not state a cause of action.

Same—Pleadings—Instructions.

2. Where the district court undertakes in an instruction to set forth the material allegations of the pleadings and the general issues for trial, its charge should present them fully and fairly; the omission of a material admission is error.

Same—Master and Servant—Contributory Negligence.

3. A locomotive engineer who was injured in a collision while on a certain track with his train in violation of a rule of defendant company was *prima facie* guilty of contributory negligence, precluding recovery in the absence of a showing in excuse of his apparent wrongdoing.

Same—Instructions—Law of Case.

4. The instructions are the law of the case and binding upon the jury; a verdict contrary thereto is a verdict contrary to law, which justifies a new trial, under section 6794, Revised Codes.

Same—Tables of Experiments—Admissibility in Evidence.

5. *Held*, that tables showing the effect of experiments made by the manufacturer of the air-brakes with which plaintiff locomotive engineer's train was equipped, offered in evidence for the purpose of showing their available power to control the movements of trains of different tonnage under varying conditions, were admissible upon the same principle as are mortality tables, almanacs, market reports, etc.

Same—Railroads—Rules—Interpretation—When for Court.

6. Where the language of defendant company's rules relative to the operation of its trains under the block signal system was plain and its meaning apparent, it was the duty of the trial court to determine the meaning to be given them and not a matter to be submitted to the jury.

Same—Costs—Mileage of Witnesses.

7. The mileage of his witnesses which a successful party to an action may recover, under sections 3182 and 7169, Revised Codes, is not limited to travel from and to their place of residence. (*Expression contra*, in *McGlaughlin v. Wormser*, 28 Mont. 177, 72 Pac. 428, *held inadvertently made*.)

Appeal from District Court, Lewis & Clark County; J. Miller Smith, Judge.

ACTION by Albert Lynes against the Northern Pacific Railway Company and another. From a judgment for plaintiff and an order denying them a new trial, defendants appeal. Reversed and remanded.

Mr. Wm. Wallace, Jr., Mr. John G. Brown, and Mr. R. F. Gaines submitted a brief in behalf of Appellants. *Mr. Wallace* argued the cause orally.

Messrs. Walsh & Nolan, and *Messrs. Purcell & Horsky*, submitted a brief in behalf of Respondent. *Mr. T. J. Walsh* argued the cause orally.

For the first time the objection is now urged that the complaint does not state facts sufficient to constitute a cause of action. Though there is no waiver of an objection of that character, the rule is that it is not looked on with favor, and that every legal intendment will be made by the court to support the pleading, which must be construed with the utmost liberality. (2 Cyc. 691; Pomeroy's Remedies and Remedial Rights, 2d ed., sec. 549.) The complaint avers that respondent's train "crashed into" extra 1308 east, with which it collided; that he jumped from his train immediately before the collision; that he jumped to avoid being killed, and while the engine was still running. Of course, he cannot recover unless, under the circumstances, a reasonable person would have jumped. If the evidence was in substantial accord with the averments so made, the conclusion would be irresistible that any reasonable person would have done the same thing. The appellant company introduced photographs to show the violence of the collision, and, as a deduction therefrom, that respondent's train was still going at a rapid rate of speed. There was no need to call an expert witness to testify that under the conditions detailed a reasonable man would have jumped had he had an opportunity. The jury draws that conclusion necessarily from the facts testified to. (See *Brockett v. Fair Haven & W. R. Co.*, 73 Conn. 428, 47 Atl. 763.) In *Allen v. Yazoo etc. R. Co.*, 40 South. 1009, some section-men, fearing they would be overtaken by a following train as they were propelling a hand-car, stopped and attempted to remove it from the track, and in doing so were struck by the approaching train. The complaint was attacked apparently on the ground that there was no averment that reasonably prudent men would have stopped as they did, but the court held the pleading sufficient when attacked as this is. The deductions to be drawn from *Poor v. Madison R. P. Co.*, 38 Mont. 341, 99 Pac. 947, are all in favor of the sufficiency of this complaint.

The Westinghouse company manufactures air-brakes. It issues a book, doubtless in the nature of an advertisement of its wares, in which are printed the results of alleged tests made showing the efficiency of the goods it has to sell. Appellant company tried to introduce what was said therein as to these tests, relying upon either the general rule of law in relation to scientific works or on the statute. Neither will justify the admission of evidence of this character. The book is not a work of science, but if it were, the rule is that "scientific books, as a rule, are not admissible in evidence." (2 Encyclopedia of Evidence, 587.) Under identically the same statute this very book offered to establish these very tests was held inadmissible in *Burg v. C. R. I. & P. Ry. Co.*, 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; and, without reference to any statute, in *Illinois Cent. v. Smith*, 120 Ky. 237, 85 S. W. 237, 1 L. R. A., n. s., 1014. The California statute, from which ours comes, is canvassed in *Gallagher v. Railway Co.*, 67 Cal. 13, 56 Am. Rep. 713, 6 Pac. 869. The conclusions of the court utterly forbid the admission of the book in question. Nor can the contents of a book be gotten in by any indirection, as by asking a witness if his views concur with those of an author which are read to him. (*Lilley v. Parkinson*, 91 Cal. 656, 27 Pac. 1091; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 170; see, also, *Union Pacific Ry. Co. v. Yates*, 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553; *Baily v. Kreutzmann*, 141 Cal. 519, 75 Pac. 104.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On June 1, 1906, Albert Lynes was employed by the Northern Pacific Railway Company as a locomotive engineer, operating from Missoula west and particularly between the stations of De Smet and Reid. His duty was to assist with his locomotive in drawing west-bound trains over the mountain. On the morning of June 1 Lynes was ordered to attach his locomotive to the front of west-bound extra train No. 1300 and proceed westward. He was notified before leaving De Smet to meet east-bound extra train No. 1308—of which the defendant Bell was the engineer in

charge—at Reid, and, to effect the passage of the two trains, it was the duty of Lynes to take his train upon the siding at Reid, and he so understood the order. Immediately after Lynes' train left De Smet, Bell's train reached Reid, pulled past the station on the main line and stopped. The switch, by means of which Lynes' train would be placed on the siding at Reid, was some 3,500 feet east of the station. From a point a considerable distance east of the switch to a point 200 feet east thereof the track proceeds on a downgrade of about seventy-eight hundredths per cent, and near the switch assumes an ascending grade of about two and two-tenths per cent compensated. Near the switch there is a curve. Lynes proceeded to take his train westward from De Smet, but passed the east switch at Reid and ran up the main line track until his locomotive collided with Bell's. Immediately before the two trains came together, Lynes jumped from his locomotive and sustained injuries. He brought this action to recover damages against the railway company and Bell, and alleges negligence in the following particulars: (a) Negligence on the part of Bell in running his train past the station at Reid; (b) negligence on the part of the railway company in permitting Bell's train to occupy a position on the main track east of the station; (c) negligence on the part of Bell and the crew of his train in failing to throw the east switch at Reid so that plaintiff's train would go upon the sidetrack; and (d) negligence on the part of the company in failing to give the plaintiff a caution card before he left De Smet. The defendants answered jointly, denying all the allegations of negligence charged, and pleading contributory negligence and assumption of risk. The trial of the cause resulted in a judgment in favor of plaintiff, and from that judgment and an order denying them a new trial the defendants have appealed.

1. It is insisted that the complaint does not state a cause of action. It is alleged that Lynes was injured as the result of his own act in jumping from the moving train, and it is urged that the complaint does not disclose that in jumping from his locomotive the plaintiff was free from contributory negligence. The former decisions of this court, beginning with *Kennon v. Gilmer*,

4 Mont. 433, 2 Pac. 21, and concluding with *Badovinac v. Northern Pacific Ry. Co.*, 39 Mont. 454, 104 Pac. 543, have established in this jurisdiction the exception to the general rule of pleading in negligence cases, *viz.*, that where plaintiff's own act is a proximate cause of his injury, he must allege and prove that in doing the particular act he was moved by those considerations for his own safety which would actuate a reasonably prudent person, similarly situated, to do as he did. In *Kennon v. Gilmer*, the excuse offered by the plaintiff for jumping from a rapidly moving coach was "apparent danger and fear of bodily injury." This court held that the allegation was insufficient to relieve the plaintiff from the imputation of negligence on his part, and the reasons, given are there set forth. In the *Badovinac Case* the plaintiff alleged that he jumped from a moving train "because (1) it was dark and he could not determine that the train was moving at a great rate of speed; and (2) the brakeman directed him to jump," and this pleading was likewise held insufficient, [1] and the subject received consideration at great length. In the present instance the plaintiff, after alleging that he was deceived by the legend on the mile-post east of the switch and because of the character of his train and the track, he ran past the switch and in Bell's train, then continues: "That immediately before such collision, plaintiff recognizing that it was inevitable, jumped from his engine while so running, as aforesaid, to avoid being killed, and in so doing received grievous bodily injuries," etc. In the *Badovinac Case* above, this court said: "In other words to show by his complaint that he was not guilty of contributory negligence he [plaintiff] must allege facts sufficient to show that he acted as a reasonably prudent person under like circumstances would have acted. This rule seems to be founded in reason. The standard of action in all such cases must be that "of a reasonably prudent person."

In order, then, to determine whether the plaintiff has stated facts sufficient, it is only necessary to ask whether the jury could say from the facts pleaded, if supported by the evidence, that he did act as a reasonably prudent person under like circumstances would have acted. Assume that plaintiff went upon the stand

and testified: "I realized that a collision between Bell's train and mine was inevitable, and I jumped from my locomotive to save my life," and that this was all the evidence upon the subject. Did he act as a reasonably prudent person would have acted under the circumstances? We undertake to say that no man or body of men could answer the question one way or another, because there are not sufficient facts upon which to base an answer or to form an opinion. If Lynes' train was running fifty miles per hour, the question would doubtless be answered in the affirmative by everyone. If, on the other hand, his train was running at two miles per hour, a negative answer might be fully justified; while, if it was running four miles per hour, different persons might disagree as to the proper answer to be made. It will be observed that the complaint does not state the rate of speed at which plaintiff's train was moving when he discovered Bell's train, or how far away Bell's train was when the discovery was made.

Nearly thirty years have elapsed since this court, in *Kennon v. Gilmer*, announced the rule applicable here, and there can scarcely be any excuse offered at this late day for disregarding the law as there laid down. The complaint fails to state facts sufficient to negative the presumption of negligence, and in that it fails to state a cause of action under the circumstances disclosed by the pleading itself.

2. The trial court undertook to state in instruction No. 1 the material allegations of the pleadings and the general issues for trial. Objection was made by defendants that the statement was not complete and did not fairly present the matters in issue. The objection was overruled, and error is predicated upon the ruling. In the complaint plaintiff pleads that it was his duty to place his train on the siding at Reid; but the court in its general instruction omits any reference to this admission, and when its attention was called to the omission, there was a refusal to correct the instruction so as to present the admitted fact to the jury. The admission was material, since it showed knowledge on the part of plaintiff of the duty imposed upon him and a full [2] appreciation of the duty. The practice of giving a general

charge analyzing the pleadings and defining the issues is to be commended, but such charge should present the matters fully and fairly, that the jury may be enlightened and not misled. (*Rand v. Butte Electric Ry. Co.*, 40 Mont. 398, 107 Pac. 87.) The trial court should have corrected the instruction so as to include the admission in the complaint mentioned above.

3. That portion of defendant's line of road between De Smet and Reid constituted a block, and the movements of trains over this track were governed by the block signal system. The semaphore at Reid was directly in front of the station and marked the beginning of the block. Under what is known as a positive block, a collision is practically impossible, for only one train can be on a block at any given time. There is, however, a permissive block upon which two or more trains may be at one time, under cautionary instructions. The siding at Reid which is altogether east of the station is not a part of the block system. This record contains more than 1400 pages. Much of it is given to explanations of the block signal rules. Without attempting a summary, we must content ourselves with the mere statement of our conclusions from the record, since it is impossible to state even the substance of the evidence within any reasonable limit.

In running his train from the west past the semaphore at Reid and entering upon the block between Reid and De Smet without orders, and despite the fact that the signal at Reid was displayed against his train, Bell was guilty of negligence. The rules under which he operated are written in plain, terse English. It was his duty to keep his train west of the semaphore at Reid, until Lynes' train had cleared the east switch and was upon the siding, for cautionary instructions were not given, such as the rules contemplate for a permissive block. In running past the east switch [3] at Reid and up the main line instead of taking the siding, Lynes violated the reasonable rules of the company and the orders under which he was operating, and was, *prima facie*, guilty of negligence which contributed to his own injury. If this record concluded with the establishment of these facts alone, Lynes could not recover, and the court so instructed the jury. In instruction 32 the jury were told that the burden was upon the

plaintiff to overcome the *prima facie* presumption of his own contributing negligence, by showing that in running past the switch and colliding with Bell's train, he was exercising reasonable care under the circumstances. In other words, the plaintiff was under the necessity of excusing himself for his apparent wrongdoing. It was his duty to stop his train before reaching the east switch and to go upon the siding. He fully understood and appreciated this, as the evidence demonstrates beyond question. In excuse of his failure to obey the rules and the orders under which he was running, the plaintiff says: "The reason I did not stop in time to go into the sidetrack, I was misled by the mile-board and could not locate the switch until I was right on it on account of the curve." In instruction 38 the court told the jury that neither one nor both of these would constitute an excuse for plaintiff's failure to stop and take the siding. This [4] instruction was the law of the case and binding upon the jury (*Bliss v. Wolcott*, 40 Mont. 491, 135 Am. St. Rep. 636, 107 Pac. 423), and a verdict contrary thereto is a verdict contrary to law, which justifies a new trial under section 6794, Revised Codes. (*State v. Radmilovich*, 40 Mont. 93, 105 Pac. 91.)

In the brief of counsel for appellants instruction 36 is treated as declaring the law above. It does not do so. Whether there is a mere clerical error or a misapprehension by counsel does not appear. The fact that instruction 38 is not mentioned would impel us to disregard this assignment but for the other errors appearing in the record.

In the brief of counsel for respondent it is insisted that there are grounds of excuse other than those mentioned by plaintiff above. However, this does violence to the plain language employed by the plaintiff, who was certainly in a position to know the causes which led to his violation of the rules and orders. It is suggested that plaintiff had been on duty a long time and that the same degree of alertness could not be demanded of him as of an engineer who had rest and sleep within a reasonable time before the accident occurred. This argument would be available if plaintiff relied upon his exhausted physical condition as a reason for forgetting his orders or as an excuse for not accurately

locating the switch; but he does not do so. He testified that he remembered his orders, knew that he had to take the siding, and directed the fireman to call the head brakeman to turn the switch. It is also suggested that the failure of the air-brakes to work as plaintiff assumed they would was also an element to be considered in excuse for his failure to stop before reaching the switch. At least, this is the force of the argument as we gather it from the brief; but this is not available, for there is not any evidence that plaintiff endeavored to use the air to stop, until, as he says, he was right at the switch—within a car-length of it.

4. It is claimed in the complaint that the company was negligent in failing to give Lynes a caution card before he left De Smet. Just what assistance such card would have rendered plaintiff is difficult to determine. It would not have disabused his mind of the erroneous impression as to the location of the mile-post, or furnished him any information as to the exact location of the switch. It would have told him that Bell's train was east of the station at Reid and within the block, but plaintiff does not claim that he ran by the switch purposely; on the contrary, the only legitimate conclusion from his own testimony is that he did his utmost to locate the switch and fully intended to stop east of it and go upon the siding, and that he did not do so because he was misled by the legend on the mile-post, and was unable to locate the switch by reason of the curve in the track immediately east of it.

5. Appellants insist that even if plaintiff showed himself excusable for running up to the switch before he located it definitely, still by the exercise of reasonable care he could have stopped his train in time to avoid the collision. From the plaintiff's own testimony it appears that he ran past the switch from 450 to 500 feet before striking Bell's train. The defendants offered an expert witness to prove that by the use of the air-brakes with which Lynes' train was equipped, he could have stopped the train before the collision occurred. They also had identified certain [5] tables representing experiments made with these air-brakes by the Westinghouse company, and offered the tables in evidence as tending to show the duty or available power of these brakes

to control trains of different tonnage under varying circumstances. The offered evidence was rejected, and error is predicated upon the ruling. The tables were offered as corroborative of the expert opinion given by the witness, and as independent evidence of the facts shown. The objection to the evidence was that it was irrelevant, incompetent and hearsay. It can scarcely be said that the offered evidence was irrelevant. It tended to prove an issue which was being controverted. If the evidence was incompetent, it was so only because it was hearsay. The courts which have rejected this character of evidence have done so uniformly upon the ground that it is hearsay, coming from a witness who was not under oath in making his experiments or in compiling his tables, and not subject to cross-examination.

It may be conceded at once that the weight of authority, numerically at least, is against the reception of this particular class of evidence; yet many of the very courts which reject it admit the standard mortality tables, almanacs, market reports and the like, which have no other basis for their evidentiary value than that they represent experiments, observations or calculations made by men of learning or experience, and that they are standard works, recognized as such and acted upon by men in the particular business to which their information relates. It does not follow, because one thousand men at the age of fifty years actually live an average of 20.91 years thereafter, that any other man of the age of fifty now will survive for that exact period of time; and yet there is scarcely a court in all the land which rejects the mortality tables, and very few which now require any preliminary proof. They are admitted, not because they are absolutely correct, but because they have been found to contain reliable information as a basis of calculation or comparison, which is so generally accepted and acted upon as to be evidence of facts of general notoriety and interest. In addition to the mortality tables, almanacs and the like, the courts are now coming to adopt a more liberal and sensible view as to the admissibility of learned treatises, tables of scientific calculations, and the like. In *Garwood v. New York C. & H. R. R. Co.*, 45 Hun, 128, the New York court held that Leffel's Tables are admissible

to prove the service capacity of certain pumps. In *Banco De Sonora v. Bankers Mutual Casualty Co.* (Iowa), 95 N. W. 232, Bouvier's Law Dictionary was introduced in evidence to show the meaning of the word "adult," as used in the civil law of Mexico. In *Warrick v. Reinhard*, 136 Iowa, 27, 111 N. W. 983, the certificate of a Breeders' Association was admitted in evidence to show the breeding of an animal, as reflecting upon the question of its value. In *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 55, the court held that tide tables prepared for Puget Sound by the engineers of the Government Coast and Geodetic Service, were admissible to prove the depth of water at low tide at a particular point. In *State v. Coleman*, 20 S. C. 441, the court dismissed the subject with this brief remark: "We understand that an expert may be examined as to how far standard works sustain or conflict with his opinion."

In *Western Assur. Co. v. Mohlman Co.*, 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561, certain tables prepared by the United States Forestry Bureau, showing the result of tests made, and like tables from Kent's Mechanical Engineer's Pocketbook and Johnson's Strains in Frame Structures, were introduced in evidence to show the crushing strength of different kinds of timbers. Upon the admissibility of these tables the circuit court of appeals says: "That information of great value is obtained by multiplying such tests and tabulating the results is surely self-evident. Under the rule contended for, that valuable information would be available for the use of a court of justice so long as the men who made the tests and prepared the tabulations were living and producible, but after their death or disappearance the information they have gathered would be lost to the court, although available for everyone else in the community, and relied upon by engineers and builders whenever a new structure is in process of erection. Upon the precise point here presented the diligence of counsel has not succeeded in discovering a single authority. We feel, therefore, no hesitancy in so modifying the general rule as to hold that, where the scientific work containing them is concededly recognized as a standard authority by the profession, statistics of mechanical experiments and tabulations of the re-

sults thereof may be read in evidence by an expert witness in support of his professional opinion, when such statistics and tabulations are generally relied upon by experts in the particular field of the mechanic arts with which such statistics and tabulations are concerned."

These cases are cited as tending to show the disposition of courts to adopt a more liberal view as to the admissibility in evidence of documents the contents of which are available to everyone else and relied upon in the most serious affairs of life. The subject is very thoroughly treated in 3 Wigmore on Evidence, chapter 55, and the conclusion to be drawn from that learned author's discussion is, that if the proper preliminary proof is made, *viz.*, that the book or chart offered is by a person indifferent between the parties litigant, is standard among the profession, trade or occupation to which it relates, and is accepted and acted upon as accurate, it should be admitted, upon the theory that the matters which it contains are facts of general notoriety and interest.

We decline to accept the narrow definition given by the supreme court of California, in *Gallagher v. Market St. Ry. Co.*, 67 Cal. 13, 56 Am. Rep. 713, 6 Pac. 869, of the phrase "facts of general notoriety and interest," as used in section 7940 of the Revised Codes. Manifestly, the legislature intended that a very wide latitude should be allowed in fixing a definition for those terms. It was doubtless considered that a fact unrecognized to-day may become one of general notoriety and interest, as the result of scientific investigation or experiments. There is not any reason which will justify the admission of mortality tables, almanacs, market reports, and the like, which will not apply equally in favor of these tables. Assuming that the proper foundation was laid—and there was not any objection upon that score—we think the court erred in excluding the evidence.

6. Witnesses were interrogated at length as to the proper meaning to be given to certain rules promulgated by the railway company for the control of its employees in operating under the block signal system; and in instruction No. 3 the court sub-

mitted to the jury, for it to determine, the meaning which should be given to these rules. If the language of a rule is vague and its meaning uncertain, evidence is admissible to show the practical interpretation put upon it by those called upon to construe the rule or by those under whose supervision the rule was [6] promulgated. But where, as in this instance, the language of the rules is plain and the meaning apparent, it is the duty of the court to declare that meaning and not leave it to the speculation of the jury. (Rev. Codes, sec. 7875; *Doherty v. Northern Pacific Ry. Co.*, ante, p. 294, 115 Pac. 401.)

7. Complaint is made of the action of the trial court in refusing to strike out of plaintiff's cost bill certain items relating to the mileage of witnesses, and an expression found in the opinion in *McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 428, is relied upon as justifying the contention now urged. In the *McGlaulin Case*, Commissioner Clayberg, speaking for the court, said: "Section 4648 of the Political Code (of 1895) provides that witnesses attending a trial are entitled to ten cents per mile each way from their place of residence to the place of trial." The question whether mileage should be allowed from the place of residence was not involved in that case, and the use of the word "residence" was a mere inadvertence. The statute cited does not impose any such limitation. That section, which is now section 3182, Revised Codes, when read with section 7169, [7] Revised Codes, clearly means that the prevailing party may recover his necessary disbursements, including mileage of witnesses. Whether the mileage shall be computed from the place of residence will depend upon the circumstances of each case. There was not any error committed in this instance.

8. Complaint is made of the refusal of the trial court to give certain instructions requested by the defendants. The record discloses that the court gave forty-eight instructions, which is three or four times as many as the question presented for trial warranted. The least that can be said is, that the court did not commit error in refusing to give other instructions requested.

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing denied June 22, 1911.



**STATE EX REL. ROWLING ET AL., APPELLANTS, v. MAYOR
OF THE CITY OF BUTTE, RESPONDENT.**

(No. 2,977.)

(Submitted May 10, 1911. Decided May 20, 1911.)

[117 Pac. 604.]

Cities and Towns—Police Department—Metropolitan Police Law—Reducing Force—Power in City Council.

1. *Held*, that the power to reduce the police force, as constituted under the Metropolitan Police Law (Rev. Codes, secs. 3304-3317), if unnecessarily large or for economical reasons, resides in the city council and not in the mayor.

Appeal from District Court, Silver Bow County; John B. McClellan, Judge.

MANDATE by the state, at the relation of James H. Rowling and others, to compel the mayor of the city of Butte to restore relators to active duty on the police force. Writ denied, and relators appealed from the judgment and an order denying them a new trial.

Mr. W. E. Carroll, and Messrs. Kirk, Bourquin & Kirk, submitted a brief in behalf of Appellants. *Mr. George M. Bourquin* argued the cause orally.

The only question involved herein is whether or not the mayor has authority to relegate members of the police force theretofore permanently appointed, to an "eligible list," so termed, on

the score of economy, and without authority or direction of the council, the council having appropriated moneys sufficient to pay their salaries; and, if so, whether he is not bound to first thus relegate to the eligible list junior probationary appointees in the inverse order of appointment. We submit he had no such power. The council creates the offices of patrolmen, and the mayor by appointments fills them. The council might empower the mayor to appoint a definite number of patrolmen, or as many as in his judgment were required. In either case, once the mayor had appointed, his power was exhausted, and in either case he could revoke no appointment nor change the status of a patrolman, save as the Metropolitan Police Law authorized him. Nor can any alleged custom prevail against said law. Nowhere does said law authorize the mayor to relegate patrolmen to any "eligible list" on the score of economy. To create and abolish certain offices, to levy and collect taxes, to fix compensation of officers, to make appropriations, to audit claims, and to determine what is necessary and to incur expense therefor, is purely legislative, and exclusively for the council. The mayor merely executes the council's will therein. (Rev. Codes, secs. 3220, 3259, subds. 2, 47, 76, sec. 3287; *Helena etc. Co. v. Helena*, 31 Mont. 247, 78 Pac. 220.)

There are cases that hold that the power that creates the offices of patrolmen may also abolish them. (*Venable v. Board*, 40 Or. 458, 67 Pac. 203.) But that is not this case. Here the council alone has the power to create a police force, and the council alone can reduce the number. (1 Dillon on Municipal Corporations, secs. 245, 250, 253, 254.) To this counsel for respondent will doubtless urge that this is an instance, not of the exercise of the power of amotion, but rather of suspension. Mechem on Public Officers, section 453, however, says that "the power to remove an officer does not include the power to suspend him temporarily from office." Reason compels the admission that if the greater power of removal is not possessed, then most certainly the lesser power of temporary suspension could not be implied. In *Speed v. Detroit*, 98 Mich. 360, 39 Am. St. Rep. 555, 59 N. W. 406, 22 I. R. A. 845, it is said: "Courts may not surmise or speculate as to

legislative enactments. With the reasons for conferring or withholding a power the courts have no concern. They must interpret the statute as they find it." (See, also, *People v. Woodruff*, 32 N. Y. 355.) So, in this case, the law being absolutely silent as to the method of reducing the police force on the score of economy, it would be unwise, we submit, for this court to read into it any power in the mayor to suspend or remove. If the court is of the opinion that such power does exist somewhere and must exist in some person or board, then it must rest with the corporation as a whole, not with the mayor alone. (*Metsker v. Neally*, 41 Kan. 122, 13 Am. St. Rep. 269, 21 Pac. 206.) This authority has been extensively quoted in support of the proposition that mandate is the proper remedy in cases of this nature to restore to office. (See, also, *State v. Kuehn*, 34 Wis. 229.)

For the sake of argument, it might be admitted that if the council by order or resolution determined economy or necessity required fewer patrolmen, it might authorize the mayor to relegate the excess in a definite number to an "eligible list." But until it does so, the mayor has no such power. And by implication, the council says these patrolmen are necessary, having appropriated sufficient money to pay their salaries. We further submit that whenever the mayor can lawfully relegate patrolmen to the eligible list, the spirit of the Police Law requires that he shall do so in inverse order of their appointment. Otherwise, he could completely change the force by first appointing new men equal in numbers to the old men, then on the score of economy reduce the force to the original number by relegating all the old men to the eligible list. True, he could do this but once, but once would, like the wound of Mercutio, serve.

Mr. Edwin M. Lamb, Mr. John R. Boarman, and Mr. N. A. Rotering submitted a brief in behalf of Respondent. *Mr. H. L. Maury* argued the cause orally.

Section 3305, Revised Codes, invests the mayor with the charge of and supervision over the police department, and in no section of the Code known as the Metropolitan Police Law is there any provisions contemplating or providing for the concurrence of

the city council in any act of the mayor, having to do with the police department, so that in view of the fact that that bill is silent upon the question of any participation by the council in such matters, it would seem, invoking the maxim "*Expressio unius exclusio alterius*," as a means of interpretation of the Police Law, that it was the intent of the legislature to invest the mayor with full power over the police department, subject to the limitations of the Act.

Taking into consideration the control and power of the mayor over the police department as given him by the Metropolitan Police Law in connection with the large general powers invested in him by the eighteen subdivisions of section 3250, it would seem that if the power to control, manage or regulate the police force rested anywhere, it would be within the scope of his duties and powers as set forth in the laws referred to, and being charged with the general supervision of the affairs of the city, it would be his duty to effect such economies in the different departments as could be done without impairing the efficiency of the public service. The attention of the court is called to the case of *People v. Waring*, 7 App. Div. 204, 40 N. Y. Supp. 275, where a veteran of the war holding his position under civil service rules was discharged from service because there was nothing for him to do. *State v. Mayor*, 63 N. J. L. 148, 43 Atl. 433, holds that where an officer becomes useless, the city, as a matter of public economy only, and only for economical reasons and purposes, was justified in discharging relators from service, notwithstanding the statute prohibited the abolishment of the offices. *Fitzsimmons v. O'Neill*, 214 Ill. 494, 73 N. E. 798, is a voluminous case, which announces and approves the general doctrine that an occupant of an office under civil service rules may be laid off where the necessity arises because of reasons of economy.

In the case at bar, when no certain number of policemen has ever been fixed as constituting the police department, and under an ordinance providing for as many "patrolmen as may be required," and bearing in mind that the mayor is invested by the Metropolitan Police Law with full control of the police depart-

ment, subject only to the limitations of the Act, it was left to the mayor to say, when the financial condition of the city demanded, who, and how many, of the patrolmen should be placed upon the eligible list to again be employed when their services were required.

MR. JUSTICE SMITH delivered the opinion of the court.

This cause relates to the same controversy and state of facts as are disclosed in *State ex rel. Rowling v. District Court*, 41 Mont. 532. On July 9, 1910, relators filed with the district court their affidavit for a writ of mandate to compel the mayor of Butte to restore them to active service. The respondent answered, admitting substantially all the averments of the affidavit and alleging affirmatively that in relieving relators from active service he was exercising a power belonging to him as mayor, and that such power was invoked solely in the interests of economy. On October 1, 1910, the court denied a peremptory writ and entered a formal judgment to that effect. The appeals are from the judgment and an order denying a new trial.

But one question is necessary of decision in order to dispose of the appeals, and that is: In whom does the power to reduce the police force reside? We said in *State ex rel. Rowling v. District Court, supra*, that this authority is assuredly lodged somewhere. The respondent claims that it rests with him, while the relators maintain that it resides in the city council alone. We think the latter contention is the correct one. Section 3259, Revised Codes, which deals with the powers of a city council, provides that it shall have power to manage the affairs of the city generally, to levy and collect taxes for general and special purposes, to fix the compensation and prescribe the duties of all officers and other employees of the city, subject to certain limitations, and to appropriate money and provide for the payment of the expenses of the city. Section 3287, Revised Codes, provides that all accounts and demands against a city must be submitted to the council, and if found correct, must be allowed and paid. In the case of *Helena Water Works Co. v. City of Helena*, 31 Mont. 243, 78 Pac. 220, this court held that it is a matter exclusively

for the city council to determine whether a particular current expense is reasonable or necessary. It will, therefore, be seen at once that the legislature has delegated to the city council the sole authority to determine what amount of money shall be expended in carrying on the city government. This duty is purely legislative, and necessarily involved therein is the power to curtail expenses when necessity dictates. The council, being charged with these general duties of supervision over the economic and financial affairs of the city, may well be presumed to be the best judge as to whether economy of administration requires that the police force shall be reduced in numbers.

The judgment and order are reversed and the cause is remanded to the district court of Silver Bow county, with directions to issue a peremptory writ of mandate as prayed for.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

POWER, APPELLANT, *v.* CITY OF HELENA, RESPONDENT.

(No. 2,980.)

(Submitted May 11, 1911. Decided May 27, 1911.)

[116 Pac. 415.]

Cities and Towns—Special Improvements—Sewers—Assessments—Injunction—Estoppel.

Cities and Towns—Special Improvements—Assessments—Theory of Taxation.

1. The theory upon which a municipality may levy an assessment for a special improvement, such as the construction of a sewer, is that the property charged receives a corresponding physical, material and substantial benefit from the improvement.

Same—Injunction—Complaint—Insufficiency—Estoppel.

2. To make the complaint of a property-holder asking a court of equity to be relieved from the payment of a special improvement tax, levied on his property for the purpose of defraying the cost of the construction of a storm sewer, on the alleged ground that his property was so situated that it could not be benefited by the sewer, proof against a general demurrer, it must set forth that plaintiff appeared at the time

and place designated in the resolution of the council for hearing objections to the proposed improvement, and that his protest was ignored; otherwise, after the improvement is made and warrants issued in payment thereof, he is estopped upon the face of his pleading.

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

ACTION by T. C. Power against the city of Helena. From a judgment for defendant rendered on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Mr. Massena Bullard submitted a brief and argued the cause orally in behalf of Appellant.

It appears from the complaint that the storm sewer in question in this case is so situated that no water, drainage or sewage matter of any kind does or can be made to flow into or through it, or any part of it, and that the real estate of plaintiff does not, and, because of its situation cannot, receive or realize any benefit or advantage through or by means of said storm sewer. "Special taxes cannot be levied by a municipality unless the property charged receives a corresponding physical, material and substantial benefit therefrom." (*City of Owensboro v. Sweeney*, 129 Ky. 607, 130 Am. St. Rep. 477, 111 S. W. 364, 18 L. R. A., n. s., 181; *McCormack v. City of Henderson*, 33 Ky. Law Rep. 854, 111 S. W. 368; *In re East 136th Street in City of New York*, 127 App. Div. 672, 111 N. Y. Supp. 916; *Bennett v. City of Emmetsburg*, 138 Iowa, 67, 115 N. W. 852; *City of Lawrenceville v. Hennessey*, 244 Ill. 464, 91 N. E. 670; *Wiese v. City of South Omaha*, 85 Neb. 844, 124 N. W. 470.)

Under the facts stated in the complaint, and which, for the purpose of the demurrer, are taken to be true, the city council was without jurisdiction to tax the property of the plaintiff for the improvement. The power of the city council to tax property for such improvement is by the language of section 3384, Revised Codes, limited to property which is "served" by the improvement. The language does not call for construction. It is plain, simple and unequivocal. Without the restrictive language of the Code, the city council would be without jurisdiction to tax

the property unless the property derived some benefit, or might derive some benefit, from the improvement. But the legislature seemed determined to express itself so clearly as to leave no room for doubt as to what property might be taxed for sewer improvement.

Mr. Edward Horsky, in behalf of Respondent, submitted a brief and argued the cause orally.

The Montana statutes prescribe the method by which jurisdiction is acquired (Rev. Codes, secs. 3369, 3370), the opportunity to be heard and object to the acquiring of such jurisdiction, the method and the forum for making objections to any assessment, and the opportunity for modifying, either in whole or in part, any such assessment (secs. 3399, 3340). The plaintiff, having failed to appear at any time, or to make any objection, before the tribunal provided by law, cannot now be heard to complain in a forum of his own choosing. (See *Town of Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353; *Annie Wright Seminary v. City of Tacoma*, 23 Wash. 109, 62 Pac. 444; *McNamee v. City of Tacoma*, 24 Wash. 591, 64 Pac. 791; *City of Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114; *Spalding v. City of Denver*, 33 Colo. 172, 80 Pac. 128; *Minnesota Imp. Co. v. City of Billings*, 111 Fed. 972, 50 C. C. A. 70; *Brown v. Drain*, 112 Fed. 582; s. c., 187 U. S. 635, 23 Sup. Ct. 842, 47 L. Ed. 351; *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1005; *Smith v. Carlow*, 114 Mich. 67, 72 N. W. 22; *Greensburg v. Zoller*, 28 Ind. App. 126, 60 N. E. 1007; *Leeds v. De Frees*, 157 Ind. 392, 61 N. E. 930; *C. & N. W. v. People*, 120 Ill. 104, 11 N. E. 418; *Wilson v. Salem*, 24 Or. 504, 34 Pac. 9, 691; *Tumwater v. Pix*, 18 Wash. 133, 51 Pac. 353.) Moreover, the determination by the city council as to what property is specially benefited in an improvement district matter is conclusive in the absence of fraud for the purpose of levying assessments to pay for such improvement. (*McNamee v. Tacoma*, *Wray v. Fry*, *supra*; *Michner v. Philadelphia*, 118 Pa. 535, 12 Atl. 174; *Turnquist v. Cass Co. Com.*, 11 N. D. 514, 92 N. W. 852.)

Where the city council has regularly assessed property for street improvements, and given notice to property owners to file objections to the assessment within a certain time, as required by statute, an owner who fails to object cannot thereafter collaterally attack the validity of the assessment; the case at bar is a collateral attack. (*Shank v. Smith*, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564; *Greensburg v. Zoller*, *McNamee v. Tacoma*, *supra*.) It is only in cases of fraud or corruption that the proceedings of the city council can be collaterally attacked. The attack in the case at bar is collateral, for the reason that the particular point made, to-wit, the alleged lack of benefit to the property, does not appear upon the face of the special improvement district resolution and proceedings of the city concerning said district. The attack, therefore, consists of a subject predicated upon matters outside the city's records and proceedings covering said special improvement district. If the attack involved some matter appearing on the face of the proceedings, or if upon the face of the city's proceedings, there appeared to be some jurisdictional noncompliance with the statutory requirements, then a collateral attack could be successfully invoked; but not otherwise. (See *Greensburg v. Zoller*, *supra*.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On August 1, 1906, the city council of Helena passed, and the mayor approved, a resolution entitled: "A resolution creating special improvement district No. 17, describing the boundaries thereof, the character of improvements to be made therein and the estimated cost thereof." The resolution designates August 13, 1906, and the city council chamber, as the time and place for hearing objections. On August 13, the resolution was finally adopted. The purpose for which the district was created was to procure a right of way for and construct a storm sewer. Within the boundaries of the district is property owned by the plaintiff. In 1907 the city levied a tax upon all the property situated within the district to defray the cost of the improve-

ment. The plaintiff declined to pay the tax and instituted this suit to secure an injunction restraining the city from attempting to enforce the tax against his property. In addition to the facts narrated above, the complaint sets forth: "That the said described real estate is situated within the boundaries of said special improvement district No. 17, but lies below the mouth or outlet of the storm sewer provided for in said resolution, and is so situated that no water, drainage, or sewage matter of any kind does or can be made to flow into or through said storm sewer, or any part thereof, and said real estate does not, and because of its situation cannot, receive or realize any benefit or advantage from, or by means of, said storm sewer." To this complaint a general demurrer was interposed and sustained, and plaintiff, electing to stand upon his pleading, suffered judgment to be entered against him, and appeals.

The regularity of the proceedings of the city in creating the special improvement district is not called in question. From the facts pleaded and the legal presumptions arising therefrom, it may be conceded that the resolution was regularly passed; that its contents are sufficient; that the required notice was given; and that plaintiff did not appear or object to the improvement or to the inclusion of his property within the district. The position of the appellant is that, since his property is so situated that it cannot be drained by the sewer and cannot receive any benefits from the improvement, he was not required to heed the notice or object to the proceeding before the council, but may invoke the aid of a court of equity for relief in the first instance. The character of the improvement is such as to make applicable section 3384, Revised Codes, which reads as follows: "Whenever a sewer serves as an outlet for the district or lateral sewers which drain a limited area, but which cannot justly be considered a public sewer benefiting the entire city or town, its cost, or any part thereof may be defrayed by special assessment levied against all the property which it serves as a drain, each lot or parcel of land benefited thereby to be assessed in the proportion which its area bears to the area of all the property affected or benefited thereby, exclusive of streets, alleys and

public places. Said levy may be made at the time of the construction of said sewer or at any future time."

If it appeared from the face of the council proceedings that plaintiff's property is so situated that it is a physical impossibility for it to be benefited, or that the amount of the tax assessed against it clearly exceeds the benefit to be derived from the improvement, then the complaint would be invulnerable; for it is the settled law in this country that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." (*Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. [1] 443.) "The whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits." (*McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440.) "Special taxes cannot be levied by a municipality unless the property charged receives a corresponding physical, material, and substantial benefit therefrom." (*City of Owensboro v. Sweeney*, 129 Ky. 607, 130 Am. St. Rep. 477, 111 S. W. 364, 18 L. R. A., n. s., 181.) And the meaning of "special benefit" is very clearly stated by the supreme court of Iowa in *Bennett v. City of Emmetsburg*, 138 Iowa, 67, 115 N. W. 582, as follows: "A lot derives 'special benefit' from the construction of a sewer, within the meaning of a statute and ordinance providing that assessments shall be made in proportion to special benefits, when the sewer is so situated and constructed that connection can be had therewith, as the opportunity presented for individual use determines the question of special benefit."

Dismissing these questions from further consideration as settled beyond controversy, there remains but the single inquiry: May a property-holder invoke the aid of a court of equity in the first instance to relieve him from an assessment for special improvements upon the ground that his property is so situated that it is impossible for it to obtain any benefit? The respondent city contends that, since the legislature has designated the city

council as a special tribunal before which objections to the creation of the proposed improvement district and to the proposed tax may be made and heard, the presentation of objections to that tribunal is a condition precedent to the right of the property-holder to go into a court of equity for relief, in the absence of fraud or lack of jurisdiction appearing upon the face of the council's proceedings. The purpose of requiring notice to be given and a hearing had by the council upon any objections to the creation of a special improvement district or assessment made therefor, is to give an opportunity to any interested property-holder to be heard and to show, if he can, that his property will not derive any special benefit from the improvement, or that his property is made to bear an unjust proportion of the burden of taxation, but equally, also, is it to enable the city to correct any errors or mistakes, and, if any appear, to readjust itself before expense has been incurred or warrants have been issued. In the present instance, if the property of plaintiff and others similarly situated can be relieved from the tax, innocent third persons who have done the work and received the warrants must suffer, or the owners of the remaining property within the district must bear the burden of the entire assessment. It may be that a particular property-holder whose property will be benefited was willing to have the improvement made, provided all the property within the proposed boundaries of the district shared in the expense, but would not have been willing if one-half of the property was excluded and the remaining portion left to bear the entire burden.

While we have not been able to find any case directly in point and the decision of the question presented is not without [2] difficulty, it seems to us that upon principle the doctrine of estoppel *in pais* is applicable here; that the failure of the plaintiff to appear before the council and object, not only deceived the city, but other property-holders as well, and led the city to incur expense which cannot otherwise be met; that now, after the expense has been incurred, the improvement made, and warrants issued, it would be altogether inequitable to permit the plaintiff to escape his proportion of the tax. He is estopped at

this late day to say that his property will not be benefited. (*Annie Wright Seminary v. City of Tacoma*, 23 Wash. 109, 62 Pac. 444.) This appears to be the general rule. (28 Cyc. 1171, 1174.) Of course, if the fact that plaintiff's property cannot receive any benefit from the improvement appeared from the face of the city's proceedings, the want of jurisdiction would be apparent, and a collateral attack upon the assessment could be maintained. But such is not the case here. To make it appear that plaintiff's property cannot be benefited requires evidence *dehors* the record; evidence as to the location of plaintiff's land with reference to the sewer and the contour of the country.

Since it does not appear affirmatively from the face of the city's proceedings that plaintiff's property cannot be benefited, the city acquired jurisdiction to make the improvement and levy a just proportion of the tax against plaintiff's property in the first instance. (Rev. Codes, sec. 3370.) The plaintiff here seeks the aid of a court of equity, and, in order to give him standing, he must allege the facts necessary to entitle him to equitable relief. In our opinion, those facts, in addition to the ones pleaded, are that he appeared before the tribunal appointed by law to receive his protest, and that his protest was ignored. Failing to make this allegation, he is estopped upon the face of his complaint, and does not state facts entitling him to equitable relief.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STORER, RESPONDENT, v. GRAHAM, SHERIFF, APPELLANT.

(No. 2,988.)

(Submitted May 13, 1911. Decided May 27, 1911.)

[116 Pac. 1011.]

Default Judgment—Setting Aside—Discretion—Corporations—Capacity to Sue—Pleadings.**Pleading—Cure by Pleading of Adverse Party.**

1. Under Revised Codes, section 6571, making it sufficient in a suit on a judgment to plead that it was "duly given or made," an allegation that a judgment was "made, filed, and entered," was cured by averments of a proposed answer that the judgment was duly given and made.

Pleading—Complaint—Insufficient Allegations Cured by Answer.

2. An insufficient allegation in a complaint that a certain company was "a corporation" was cured by an averment in the proposed answer that the company was "a corporation of Montana."

Default Judgment—Vacation—Discretion.

3. In determining whether in exercising a sound legal discretion a default judgment should be set aside, the allegations of the complaint and a proposed answer were properly considered.

Corporations—Pleading—Capacity to Sue.

4. An allegation that a defendant was a corporation was sufficient to show its capacity to be sued.

Default Judgment—Refusal to Vacate—Discretion.

5. It was not an abuse of discretion to refuse to set aside a default judgment obtained through inexcusable neglect of defendant, no question of inadvertence or surprise being presented.

Appeal from District Court, Missoula County; J. Miller Smith, a Judge of the First Judicial District, presiding.

ACTION by Frank Storer against Davis Graham, Sheriff of Missoula County. From an order refusing to set aside a default judgment, and defendant appeals. Affirmed.

Mr. Harry H. Parsons submitted a brief in behalf of Appellant, and argued the cause orally.

In behalf of Respondent, there was a brief by *Messrs. Hall & Patterson* and oral argument by *Mr. Patterson*.

MR. JUSTICE SMITH delivered the opinion of the court.

The complaint in this action alleges, in part, as follows: "That on and prior to the 12th day of June, 1909, and at all times since said time, the Butte Lumber Company, a corporation, was and has been the owner of the following described goods, chattels, and personal property, and at all times herein mentioned has been, has continued to be, and now is, entitled to the possession of said goods, chattels, and personal property, except as herein-after set forth, said property being as follows, to-wit [describing it]. That on the 12th day of June, 1909, the above-named plaintiff, Frank Storer, commenced an action against the Butte Lumber Company, a corporation, in the district court in and for Missoula county, in which plaintiff demanded judgment against the said Butte Lumber Company, in the sum of \$1,328.17; that thereafter the said Butte Lumber Company was duly served with summons and copy of said complaint, and more than twenty days having passed and the defendant not having appeared, the default of said defendant was entered, and thereafter on the 9th day of September, 1909, a judgment was made, filed and entered in the above-entitled cause, in favor of Frank Storer against the Butte Lumber Company, a corporation, in the sum of \$1,328.17, together with costs in the sum of \$15.90." It is then set forth that plaintiff filed an affidavit and undertaking on attachment, that a writ of attachment was issued and levied upon the property described in the complaint; that after the entry of judgment a writ of execution was issued and placed in the hands of the defendant, with instructions to make the amount of the judgment out of the attached property, but the defendant "failed, neglected and refused to sell said property under said execution, but unlawfully and without the consent of plaintiff and against plaintiff's protest, converted said property to his own use and wrongfully transferred the same to other parties and failed to execute and satisfy said judgment or any part thereof out of said property," to plaintiff's damage, etc. Summons and complaint were personally served on March 18, 1910. On April 14, 1910, defendant not having appeared in the cause, his default

was noted, and on April 27, 1910, judgment was entered against him as prayed for in the complaint. On May 16, 1910, defendant through his attorney, Mr. Parsons, filed and served a notice of motion to vacate and set aside the default and judgment, and on May 18 the motion was served and filed. It reads as follows:

"Comes now the defendant above named and respectfully submits to the court herein his affidavit on merit and his answer in the above-entitled action, and respectfully moves the court to vacate the judgment and default entered in the above-entitled action on the fourteenth and twenty-seventh days of April, 1910, upon the grounds and for the reasons following, to-wit:

"I. That the complaint in the above-entitled cause does not state a cause of action against the defendant upon which any valid default could be entered or judgment taken.

"II. That said complaint is defective particularly in the following regards, to wit: (1) That there is no allegation of any judgment duly made or given by this court in favor of the above-named plaintiff and against the Butte Lumber Company. (2) That there is no allegation in said complaint showing whether or not said Butte Lumber Company is a corporation, domestic or foreign, so that any judgment could be pleaded in bar by it. (3) That there is no allegation of any service upon the said Butte Lumber Company, as a corporation, whether by publication or personal service, or upon any officer, agent, or other authorized representative of the said corporation, whether foreign or domestic, and there is no allegation in said complaint that the time for appearance of the said Butte Lumber Company in the said cause, as alleged in paragraph III of the complaint, had expired, or that the said default was duly entered or made, as required by law. (4) There is no allegation in said complaint that any written instructions were ever given to the sheriff by the said defendant company. (5) That the defendant herein has a good, valid and subsisting defense to said action, as is shown by his affidavits hereto annexed, filed herewith, and made a part hereof. (6) That the said complaint did not contain a correct copy of the writ of attachment issued in the case of *Frank Storer v. Butte Lumber Company*, and that the return

of the sheriff thereto, wherein it is shown that a third party claim was made, and request made of said plaintiff to write a bond to protect the sheriff in case of sale, is duly and regularly made, entered, and given. (7) That the defendant herein was chargeable with excusable neglect, inadvertence and surprise as shown by the affidavits and merits attached hereto and made a part hereof."

The following affidavits were filed in support of the motion. *viz.:*

"Davis Graham, being duly sworn upon his oath, deposes and says: That he is the defendant in the above-entitled cause, and that service of a copy of the complaint herein, together with a copy of the summons, was made upon him, in the county of Missoula, state of Montana, on the 18th day of March, 1910; that immediately upon the receipt of the said copies of said complaint and summons, affiant delivered the same to Fred L. Miller, under-sheriff of said county, and of this affiant, with request that said Miller deliver the same to Harry S. Parsons, a regularly licensed and practicing attorney in said county and state, with instructions to the said attorney to look after the same and to make appearance for affiant and defend the said action by and on behalf of this defendant, and that he had every reason to believe, and did believe, that the said Fred L. Miller, as and when so requested, had in fact delivered the said summons and complaint to the said attorney with the instructions herein-before mentioned to him to be carried out; that affiant did not know, suspect, or have any reason to believe that the said attorney had not made any appearance in said action, and that said action was not being defended by him, until the 12th day of May, 1910, on which date he was informed that default had been entered in the above-entitled action and judgment taken against him; that he thereafter sought and had an interview with the said Harry H. Parsons, who then informed him that he had never heard of said case; and that he had acted with diligence and promptitude in moving to set aside the said default and making this affidavit; that affiant herewith files his answer in the above-entitled cause, and is informed and believes that he has a

just, valid and subsisting defense to the allegations in plaintiff's complaint and each and every part thereof, all of which will more particularly appear by reference to the answer of defendant attached hereto, and made a part hereof. Further affiant saith not. [Signed] Davis Graham."

"V. S. Kutchin, being first duly sworn upon his oath, deposes and says: That he is a regularly and duly licensed and practicing attorney at law in and for the state of Montana, residing and located at Missoula, Missoula county, therein; that he has offices with Harry H. Parsons, an attorney at law mentioned in the affidavit of Davis Graham, attached hereto; that he has read the affidavit of under-sheriff Fred L. Miller, wherein it is stated that the said Miller delivered a copy of the complaint and summons in the above-entitled action to this affiant, with instructions to give the same to said Harry H. Parsons; that this affiant has no recollection whatever of any such transaction, and has no recollection of the said F. L. Miller delivering copy of said complaint and summons to him at any time or at any place; and that if the said F. L. Miller did so deliver said complaint and summons to said affiant, that affiant must have placed them upon the desk of the said Harry H. Parsons, which is his custom and practice in all such cases. Further affiant saith not. [Signed] V. S. Kutchin."

"Fred L. Miller, being first duly sworn upon his oath, deposes and says: That he is the duly appointed, qualified and acting under-sheriff of Missoula county, Montana; that on the — day of April, 1910, the above-named defendant, Davis Graham, handed and gave to this affiant, a copy of summons and complaint, with instructions to this affiant to give and deliver the same to one Harry H. Parsons, an attorney of Missoula county, Montana, and to instruct the said Parsons to make appearance in said cause and to defend the same; that immediately thereafter this affiant went to the office of the said Parsons and found him absent; that in the same office is one V. S. Kutchin, an attorney at law, occupying the same offices with said Harry H. Parsons and associated with him in many cases; that affiant herein delivered on said last-mentioned day the said copy of

summons and complaint to the said Kutchin, to deliver the same to the said Harry H. Parsons, and to direct him to make appearance in the said case and defend the same; that this affiant believed and supposed that said Kutchin had so delivered to the said Parsons the summons and complaint, until the 12th day of May, 1910, at which time this affiant was informed by the defendant above named that default or judgment had been taken against him, the said defendant. Further affiant saith not. [Signed] Fred L. Miller."

"Harry H. Parsons, being first duly sworn upon his oath, deposes and says: That he is an attorney at law, duly and regularly licensed to practice in the state of Montana, located in the city and county of Missoula, state of Montana; that the said V. S. Kutchin, maker of the affidavit annexed hereto, never delivered to him the summons and complaint in the above-entitled action; that he never heard of such case or action until the 12th day of May, 1910, at which time the above-named defendant informed and apprised this affiant that judgment and default had been taken against him. Further affiant saith not. [Signed] Harry H. Parsons."

The proposed answer, after admitting substantially all of the allegations of the complaint, sets forth affirmatively that the judgment against the Butte Lumber Company, "a corporation of Montana," "was duly given and made," and by way of confession and avoidance alleges that after the property was attached, one Wagner made a third party claim thereto; that notice of the claim was duly given to the plaintiff with a demand that he furnish the defendant sheriff with a bond of indemnity to protect him; that the plaintiff refused to furnish the bond and "then and there notified defendant that the bond of indemnity would not be furnished," whereupon "defendant relinquished and surrendered the property to the third party so claiming the same." On June 12, 1910, the court refused to open the default and set the judgment aside, and this appeal is from the order of refusal.

1. The contention that the complaint does not state facts sufficient to constitute a cause of action is of no avail to appellant

on this appeal. The allegation therein contained that the "judgment was made, filed, and entered," while not strictly in the [1] words of the statute (Rev. Codes, sec. 6571), is amply cured by the averment of the proposed answer that said judgment "was duly given and made." The defendant employed the exact words of the statute.

The same may be said as to the allegation "the Butte Lumber [2] Company, a corporation." The proposed answer supplies the information that it is "a corporation of Montana."

The only question of fact presented by the answer is, whether the defendant was justified in releasing the property on a third party claim. He tendered no other substantial issue. There is an implied admission therein that the plaintiff's judgment is [3] still in full force and unpaid. The district court properly took these allegations into consideration in determining whether, in the exercise of a sound legal discretion, the default and judgment should be set aside. (*Donlan v. Thompson Falls C. & M. Co.*, 42 Mont. 257, 112 Pac. 445.) If the defendant were allowed to file his proposed answer, all of the questions which he now raises as to the sufficiency of the complaint would immediately become altogether immaterial.

The allegation that the defendant was a corporation was [4] sufficient to show its capacity to be sued. (*Pearce v. Butte Electric Ry. Co.*, 41 Mont. 304, 109 Pac. 275.)

2. We find nothing in the affidavits to warrant the conclusion that the district court abused its discretion in refusing to set aside the default and judgment. The appellant intrusted the matter of delivering the papers in the case to his deputy, Miller. While it was, of course, his privilege to do so, still he must abide the consequences of Miller's neglect to deliver them to Mr. Parsons personally. He had no authority to deliver them to Mr. Kutchin, and it is not altogether clear that he did so. There [5] is no question of inadvertence or surprise presented. The district court held that the neglect of Miller, defendant's agent,

was not excusable, and we find no abuse of discretion in the ruling. That is the only question for this court to determine.

The order is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

BUTTE MACHINERY CO., RESPONDENT, *v.* CITY OF BUTTE, APPELLANT.

(No. 2,985.)

(Submitted May 12, 1911. Decided May 27, 1911.)

[116 Pac. 357.]

Cities and Towns—Actions Against—Injuries to Property—Notice—Complaint—Insufficiency.

Cities and Towns—Actions Against—Injuries to Property—Notice.

1. The provision of section 3289, Revised Codes, requiring that before a city or town can be held liable for damages for an injury on account of any defect in a street, sidewalk, etc., notice thereof must be given to the municipality, is applicable as well to injuries to property as it is to those of a personal character.

Same—Complaint—Insufficiency.

2. The complaint in an action against a city for damages to plaintiff's premises occasioned by a defective sewer-pipe, which failed to allege that the notice required by section 3289, Revised Codes, had been given to defendant city, did not state a cause of action.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by the Butte Machinery Company against the City of Butte. Defendant had judgment, and the district court ordered a new trial. Defendant appealed. Reversed and remanded.

Mr. Edwin M. Lamb, Mr. John R. Boarman, and Mr. N. A. Rotering, for Appellant, submitted a brief. *Mr. Rotering* argued the cause orally.

Messrs. Kremer, Sanders & Kremer submitted a brief in behalf of Respondent. *Mr. A. Kremer* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover damages claimed to have been suffered by plaintiff as the result of alleged negligence on the part of the city of Butte. The trial of the cause resulted in a verdict and judgment in favor of the defendant city. The trial court granted plaintiff a new trial, and defendant appealed from the order.

The complaint alleges that the city was negligent in caring for a certain public sewer; that the sewer-pipe became decayed; that the city was given notice of the defect, but failed to make repairs; that the sewer-pipe finally gave way, and the sewage flowed out over plaintiff's property, causing damage to the amount of \$2,750. The complaint does not allege that plaintiff, or anyone in its behalf, ever gave to the city or its officers any notice of the injury. It is alleged that the damage occurred on May 15, 1909. The action was commenced on November 4, 1909. Section 3289, Revised Codes, provides: "Before any city or town in this state shall be liable for damages for, or on account of, any injury or loss alleged to have been received or suffered by reason of any defect in any bridge, street, road, sidewalk, culvert, park, public ground, ferry-boat or public works of any kind in said city or town, the person so alleged to be injured, or someone in his behalf, shall give to the city or town council, or trustee, or other governing body of such city or town, within sixty days after the alleged injury, notice thereof; said notice to contain the time when and the place where said injury is alleged to have occurred." The provisions of [1] this section are applicable alike to injuries to person and injuries to property. (*Nichols v. City of Minneapolis*, 30 Minn. 545, 16 N. W. 410.) In *Tonn v. City of Helena*, 42 Mont. 127, 111 Pac. 715, the reason for requiring such notice is fully set forth. The same reason exists for the notice in case of injury to property as in case of injury to the person. (*Nichols v. City of Minneapolis*, above.) In an action against a municipality, under a statute of this character, the rule is quite uniform

throughout the country that in order to state a cause of action, the complaint must allege that the required notice was given. (28 Cyc. 1470.)

In failing to allege that the notice was given, the complaint [2] fails to state a cause of action, and the trial court erred in granting a new trial. The order is reversed and the cause is remanded, with directions to set aside the order, and enter, in lieu thereof, an order refusing plaintiff a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

IN RE MURPHY'S ESTATE. MURPHY, RESPONDENT, v.
NETT, APPELLANT.

(No. 2,925.)

(Submitted May 9, 1911. Decided May 27, 1911.)

[116 Pac. 1004.]

Probate Proceedings—Will Contest—Undue Influence—Insanity—Burden of Proof—Presumptions—Instructions—Evidence—Depositions—Inadmissibility—Appeal and Error—Assignments of Error—Briefs.

Appeal—Assignments of Error—Briefs.

1. An error not assigned in appellant's brief will not be considered on the appeal.

Will Contest—Undue Influence—Insanity.

2. In a legal sense, undue influence in the making of a will cannot be exerted upon one who is so far insane or unconscious as to be destitute of testamentary capacity.

Same—Undue Influence—Insanity—Inconsistent Findings—Effect.

3. Findings made in a case involving the probate of a will, (1) that testator was incompetent to make a will, and (2) that he executed the instrument while under undue influence, though involving illogical conclusions under the rule declared in paragraph 2 *supra*, held not so far inconsistent as to require the rendition of different decrees mutually destroying each other and hence the reversal of the decree, but that, either being supported by the evidence, the other could properly be disregarded and the decree denying probate allowed to stand.

Same—Setting Aside Will—Quantum of Proof.

4. A will should not be set aside except upon substantial evidence tending to show that it was not in fact the will of the testator.

Same—Sanity—Presumptions—Instructions.

5. The presumption that all persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity, attaches not only in a criminal case in which the defense of insanity is interposed (Rev. Codes, sec. 8113), but generally to human conduct in the relations of life; hence the giving of an instruction to that effect in a will contest in which the sanity of the testator was called in question was not error.

Same—Presumptions—Intermittent Insanity.

6. The presumption that a thing once proved to exist continues as long as is usual with things of that nature applies only to those conditions which from their nature must continue for some appreciable length of time; it, therefore, has no application to cases of intermittent or occasional insanity, but only to those of an habitual or permanent nature.

Same—Intermittent Insanity—Evidence—Immateriality.

7. Where the evidence in a contest involving the probate of a will tended to show that testator had been suffering from intermittent or occasional insanity, the question at issue was whether he was of sound mind at the time he executed the instrument; if so, evidence of his mental condition preceding and subsequent to its execution was immaterial.

Same—Burden of Proof—Erroneous Instruction.

8. In a will contest, the general burden being upon the contestant to establish by a preponderance of the evidence the facts upon which he relies to set the will aside, it was error to instruct the jury that the proponent was bound to show that, insanity in testator having been shown to exist at a time preceding as well as subsequent to its execution, it was executed at a time when he was of sound and disposing mind, else they should find for contestant.

Same.

9. The evidence as to whether testator's sanity was general and habitual, or intermittent only, having been in direct conflict, the instruction referred to in paragraph 8 above was further erroneous as invading the province of the jury in that it in effect assumed that his mental condition was habitual, a question exclusively for their determination.

Same—Evidence—Hypothetical Questions—Contents.

10. A hypothetical question reciting a fact not shown by the evidence is improper.

Same—Insanity—Depositions—Evidence—Inadmissibility.

11. A deposition taken to be used in a guardianship proceeding was improperly admitted in evidence in a contest involving the question whether the incompetent for whom a guardian was appointed, and who subsequently died of dementia, was sane or insane at the time he executed the will sought to be probated; neither the parties nor the subject matter were the same, hence the evidence was inadmissible under section 8010, Revised Codes.

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

CONTEST of will of Edward J. Murphy, deceased, by Mary Murphy against Anna E. Nett. Judgment for contestant, and contestee appeals. Reversed and remanded.

Messrs. H. G. & S. H. McIntire submitted a brief in behalf of Appellant. *Mr. H. G. McIntire* argued the cause orally.

It is a matter of notoriety that attacks on testamentary dispositions have become alarmingly frequent; indeed, it may safely be said that in the lay mind the only excuse which is needed for such an attack is dissatisfaction on the part of a deceased person's heirs at law with the provisions of such a disposition; and seldom it is that a jury fails to respond favorably to the clamors of the disappointed or dissatisfied ones. Hence it is that the courts have found it necessary to closely scrutinize the testimony in will contests and grant a new trial if the verdict returned is in utter disregard of the evidence. (See *Schmidt v. Schmidt*, 201 Ill. 191, 66 N. E. 374; *Bradley v. Palmer*, 193 Ill. 15, 61 N. E. 856; *In re McDevitt's Estate*, 95 Cal. 17, 30 Pac. 106; *Rutherford v. Morris*, 77 Ill. 397; *Freeman v. Easly*, 117 Ill. 317, 7 N. E. 656; *Nieman v. Schnitker*, 181 Ill. 400, 55 N. E. 151.) And this court is, apparently, in full accord with the views expressed in these cases. (*In re Miller's Estate*, 37 Mont. 545, 97 Pac. 935; *In re Hobbin's Estate*, 41 Mont. 39, 108 Pac. 8.)

The *quantum* of proof essential to the validity of a verdict is prescribed by section 7856, Revised Codes. This statute is identical with section 1835 of the California Code of Civil Procedure, under which it was held in *Gustafson v. Stockton etc. Co.*, 132 Cal. 619, 64 Pac. 995, that evidence which was slight and vague would not justify a verdict. (See, also, *Brown v. Central etc. Co.*, 72 Cal. 527, 14 Pac. 138; *Carpenter v. Bailey*, 94 Cal. 406, 29 Pac. 1102 (a will contest); *Puckhaber v. Southern etc. Co.*, 132 Cal. 363, 64 Pac. 481; *Bagnall v. Roach*, 76 Cal. 106, 18 Pac. 137; *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 703.)

A new trial is properly granted in a proceeding to contest a will for errors of law which affected the verdict, but if the verdict has no support in the evidence, then the presumption of validity of the will attaches, and judgment must be entered accordingly. (*Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634, 22

L. R. A., n. s., 1025; *In re Shell*, 28 Colo. 167, 89 Am. St. Rep. 181, 63 Pac. 413, 414, 53 L. R. A. 389)

No weight should or can be attached to the testimony of plaintiff's medical experts, Scanland and Riddell, because of the incomplete statement of the facts in the hypothetical question propounded to them on which it is predicated. It has been well said that an opinion can have no weight other than that which the reasons or grounds therefor bring to its support. (*In re Dolbeer's Estate, supra*; *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Brashears v. Orme*, 93 Md. 442, 49 Atl. 620; *Prentis v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494; *Wetherbee v. Wetherbee*, 38 Vt. 454; *Hitchcock v. Burgett*, 38 Mich. 501.) That little weight is properly attachable to so-called expert testimony of medical men, no matter what their standing may be, see *In re Dolbeer's Estate, supra*; *In re Phillip's Will*, 34 Misc. Rep. 442, 69 N. Y. Supp. 1011; *In re Kiedaich's Will*, 13 N. Y. Supp. 255. "The opinions of experts upon a question of testamentary capacity are entitled to but little weight as against proof of facts and circumstances which show mental and testamentary capacity." (*Burley v. McGough*, 115 Ill. 11, 3 N. E. 738; see, also, *Treat v. Bates*, 27 Mich. 390; *Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45; *Johnston v. Turnbull*, 124 Fed. 476.) The testimony of an attorney who drew the will of testator and that of the physician who attended him at the time, when positive as to the testamentary capacity, is of far more weight than the opinion of medical experts, based on hypothetical questions. (*In re Kane's Estate*, 206 Pa. 204, 55 Atl. 917.)

To make a valid will it is not necessary that the testator should be endowed with an intellect measured up to the ordinary standard of mankind. (See *Keely v. Moore*, 196 U. S. 46, 25 Sup. Ct. 169, 49 L. Ed. 376; *Kingsbury v. Whitaker*, 32 La. Ann. 1055; *Scott v. Briscoe*, 36 La. Ann. 278.) "Impairment of mind and weakness of mind do not constitute the statutory unsoundness of mind which is required to invalidate a will." (*Leeper v. Taylor*, 47 Ala. 221; *McFadin v. Catron*, 138 Mo. 197,

38 S. W. 932, 39 S. W. 771; *McBride v. Sullivan*, 155 Ala. 166, 45 South. 902; *Southworth v. Southworth*, 173 Mo. 59, 73 S. W. 129; *In re Folts*, 71 Hun. 492, 24 N. Y. Supp. 1052.)

"In order to establish undue influence, proof must be made of some fraud practiced, some threats or misrepresentations made, some undue flattery, or some physical or moral coercion employed, so as to destroy free agency in the testator." (*In re Murray's Estate*, 11 Pa. Co. Ct. Rep. 263; *Tawney v. Long*, 76 Pa. 106; *In re Pensyl's Estate*, 157 Pa. 465, 27 Atl. 669; *In re Logan's Estate*, 195 Pa. 282, 45 Atl. 729; *Herster v. Herster*, 122 Pa. 239, 9 Am. St. Rep. 95, 16 Atl. 342; *Pennypacker v. Pennypacker* (Pa.), 8 Atl. 634; *Trumbull v. Gibbons*, 22 N. J. L. 117.) "The influence of gratitude, affection or attachment, or the desire of gratifying the wishes of another, do not amount to undue influence." (*Jackson v. Hardin*, 83 Mo. 175; *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *Riley v. Sherwood*, 144 Mo. 366, 45 S. W. 1077; *Tibbe v. Kamp*, 154 Mo. 545, 54 S. W. 879, 55 S. W. 440; *Sehr v. Lindemann*, 153 Mo. 276, 54 S. W. 537; *Campbell v. Carlisle*, 162 Mo. 634, 63 S. W. 701; *Duffield v. Robeson*, 2 Harr. (Del.) 375; *In re Disbrow's Estate*, 58 Mich. 96, 24 N. W. 624; *Patterson v. Lamb*, 21 Tex. Civ. App. 512, 52 S. W. 98; *In re Halbert's Will*, 15 Misc. Rep. 308, 37 N. Y. Supp. 757; *In re Gleespin's Will*, 26 N. J. Eq. 523; *In re Elliott's Will*, 25 Ky. (2 J. J. Marsh.) 340.) "Confidential relations existing between testator and beneficiary do not alone furnish any presumption of undue influence." (*Mackall v. Mackall*, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84.) "The law does not permit undue influence to be inferred from the mere fact that one who is to profit by the instrument had an opportunity to impress his will upon the mind of the testator. There must be some evidence tending to show that an undue influence was actually exerted." (*Smith's Exr. v. Smith*, 67 Vt. 443, 32 Atl. 255; *Riley v. Sherwood*, 144 Mo. 354, 366, 45 S. W. 1077; *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 591; *Armstrong v. Armstrong*, 63 Wis. 162, 23 N. W. 407.) The influence which will invalidate a will must not only be

undue, but it must exist at the time of the making of the will, and must be a controlling influence in impelling the execution of the act itself. (*Nelson's Estate*, 132 Cal. 182, 64 Pac. 292, 298; *In re Calef's Estate*, 139 Cal. 673, 73 Pac. 539.) In the late case of *Ginter v. Ginter, supra*, the whole subject of what constitutes undue influence is so exhaustively and lucidly gone into as to leave very little open for further discussion.

"If the testator was of sound mind at the time he executed his will, it is immaterial what the condition of his mind was either before or after that time." (Beach on Wills, sec. 98; see, also, *Bundy v. McKnight*, 48 Ind. 502; *Clark v. Ellis*, 9 Or. 128; *In re Carithers' Estate*, 156 Cal. 422, 105 Pac. 127; *In re Wilson's Estate*, 117 Cal. 276, 49 Pac. 176, 711.) "If it is shown that a testator was insane at any time prior to the making of the will, this fact will not support the presumption that the insanity continued down to the making of the will, unless it is shown that it was habitual and fixed." (*Murphree v. Senn*, 107 Ala. 424, 18 South. 264.) Insanity which is not shown to be settled or general, as contradistinguished from a mere temporary aberration or hallucination, will not be presumed to continue until the contrary is shown. (*People v. Francis*, 38 Cal. 183; *Turner v. Rusk*, 53 Md. 65; *In re Nelson's Estate*, 132 Cal. 182, 64 Pac. 298.) The burden of proof to show mental incompetence is on the contestant. (*In re Dolbeer's Estate, supra*; *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319.)

Messrs. Galen & Mettler submitted a brief in behalf of Respondent, and argued the cause orally.

"On a contest of a will on the ground of mental incapacity it was proper to instruct the jury that testamentary incapacity is an incapacity existing contemporaneously with the execution of the alleged will; that, the original presumption of sanity and capacity being always indulged, the burden of proving such incapacity is on contestants, and can only be shifted by showing prior insanity, or actual insanity, or other incapacity, at the date of the instrument." (*Eastis v. Montgomery*, 95 Ala. 486, 36 Am. St. Rep. 227, 11 South. 204.), "When the validity of a

will is contested on the ground of the testator's mental incapacity, the burden of proof is, in the first instance, on the contestant; but when lunacy has been once established, it then devolves on the proponent to show that the will was executed during a lucid interval, and he cannot again shift the *onus* by proving merely that the testator 'had lucid intervals on the morning of the day before' the execution of the will." (*Saxon v. Whitaker's Exr.*, 30 Ala. 237.) "As sanity is always to be presumed until the contrary be shown, so if insanity can be proved at any time before making the will, it will be presumed to have continued, unless the contrary be shown." (*Duffield v. Morris' Exr.*, 2 Harr. (Del.) 375.) "If it be proved that a testator, a short time before making his will, was of unsound mind, it throws the burden of proof upon those who come to support the will to show the restoration of his sanity." (*Halley v. Webster*, 21 Me. 461.)

"In an action to set aside a will, if it is proved that there was a general failure or derangement of the mental powers of the testator for any considerable time, it will rest upon the party supporting the will to show that such incapacity had ceased prior to the making of the will." (*Clarke v. Fisher*, 1 Paige (N. Y.), 171, 19 Am. Dec. 402.) "Every man is presumed to have a sound mind until the contrary be shown, and it is incumbent on the party alleging insanity to establish the fact. If general insanity be proved, it is presumed to continue until a recovery be shown, and the party alleging a restoration to sanity must prove his allegation. Insanity at the time of making a supposed will must be shown." (*Grabill v. Barr*, 5 Pa. (5 Barr.) 441, 47 Am. Dec. 418.) "On the question of the validity of a will, where there is uncontradicted evidence of general insanity at a particular period, the *onus* of showing a lucid interval at the very time of the subsequent execution of a will lies on the party claiming under it. It is not sufficient that there is evidence of sanity before and after the day on which the will is made; and the jury cannot be permitted, from such evidence, to infer that a lucid interval intervened during which the will was executed." (*Harden v. Hays*, 9 Pa. (9 Barr.) 151.) "When once mental

incapacity is established, and a general derangement or imbecility of mind clearly proved at any time prior to the execution of the alleged will, the burden of proof is changed, and those seeking to establish the validity of the paper must show that at the time of its execution the alleged testator had sufficient mental capacity to execute a will, and that he had mind, memory, understanding and judgment, so that he could, in an intelligible way, dispose of his property." (*Landis v. Landis*, 1 Grant Cas. (Pa.) 248.) "Where a will is impeached on the ground of the insanity of the testator, it is incumbent upon those impeaching to show that the maker was not of sound mind at the date of the will; and for this purpose, proof of insanity, both before and after the date of the will, is admissible. Proof of insanity at those dates will throw the *onus* of proving sanity at the date of the will on those who support the will." (*Ford v. Ford*, 26 Tenn. (7 Humph.) 92.)

"Proof of the existence of confidential relations between testator and the legatee or devisee imposes upon proponent of the will the burden of showing by affirmative evidence the testator's capacity, volition and free agency." (*Daniel v. Hill*, 52 Ala. 430).

"The existence of a confidential relation, such as that of principal and agent, does not prevent one party from making a gift or legacy to the other, but only throws on the one claiming the gift or legacy the burden of showing that no undue influence was employed, or artifice or concealment practiced to obtain it." (*Decker v. Waterman*, 67 Barb. 460.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On December 24, 1909, Anna E. Nett, defendant, filed a petition in the district court of Lewis and Clark county asking for an order admitting to probate a paper purporting to be the last will and testament of Edward J. Murphy, deceased, and to have been executed at Portland, Oregon, on December 12, 1908. The paper bears the signature of the deceased, attested by two wit-

nesses pursuant to the form prescribed by the statute. On January 8, 1910, Mary Murphy, plaintiff, the mother of the deceased, filed her written opposition to the probate, alleging, in substance: (1) That, at the time of the execution of the paper, Edward J. Murphy was insane and wholly lacking in mental capacity to make testamentary disposition of his property, and that the pretended will was not and is not his will; and (2) that the said instrument, if executed at all by the said Murphy, was procured to be executed by undue influence on the part of the defendant. Upon these allegations there was issue by answer. Upon a trial had to a jury, the following findings were returned:

"(1) Was the deceased, Edward J. Murphy, competent to make a last will and testament at the time of the signing of the instrument offered for probate as his will? Answer: No.

"(2) Was the mind of the deceased, Edward J. Murphy, at the time of the execution of the instrument offered for probate as his will, free from the undue influence of the defendant, Anna E. Nett? Answer: No."

The court entered its judgment thereon, rejecting the will and declaring that the deceased died intestate. The defendant has appealed from the judgment and an order denying her motion for a new trial. The principal contention is that the evidence is insufficient to justify the findings. Before proceeding to examine the evidence, however, we may properly notice briefly some suggestions made by counsel for appellant touching the sufficiency of the allegations of fact by plaintiff, showing undue influence, and alleged inconsistency in the findings.

It is suggested that the ultimate facts showing how undue influence was exerted upon the mind of the deceased are not alleged, and hence that this ground of plaintiff's opposition is vulnerable to a general demurrer. We understand that this suggestion carries with it the further suggestion that this ground of opposition is insufficient to sustain a judgment. We do not question the propriety of the rule invoked by counsel (*Estate of Gharky*, 57 Cal. 274; *In re Sheppard's Estate*, 149 Cal. 219, 85 [1] Pac. 312); but we find nothing in the assignments of error

in the brief on this subject. Counsel are therefore not entitled to have the suggestion in this behalf considered. (*Hickey v. Kaufman*, 34 Mont. 106, 85 Pac. 870; *Delmoe v. Long*, 35 Mont. 139, 88 Pac. 778; *Lehane v. Butte Electric Co.*, 37 Mont. 564, 97 Pac. 1038; *Foster v. Winstanley*, 39 Mont. 314, 102 Pac. 574.) If it be conceded that this ground of opposition should be held insufficient as a pleading in point of law, yet, under the view we have taken of the case, the integrity of the judgment is in nowise affected. The allegation of want of testamentary capacity contained in the first ground of opposition is conceded to be, and is, sufficient to support the judgment, and no serious contention is made that the finding in response to the issue tendered thereon is not sufficient.

But counsel say that the two findings are inconsistent, in that the one negatives the existence of the fact found in the other, in other words, that the finding that the deceased executed the alleged will under the impulse of undue influence exerted by the defendant, implied testamentary capacity. A person enfeebled in mind and body, though still retaining testamentary capacity, may be more readily swayed and influenced by those about him, than when in his normal condition; yet, in a legal sense, undue [2] influence cannot be exerted upon a person who is so far insane or unconscious as to be destitute of testamentary capacity. (*Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295; *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273; 29 Am. & Eng. Ency. of Law, 2d ed., 104.) When in this condition a person is without intelligent volition; he is for that reason not legally responsible for his acts, whether they are prompted by others or not. Undue influence imposes a restraint on the will of the testator, who, but for the restraint, would be free and responsible, so that his testamentary act is not the result of his own volition, but of the will of another. Therefore, the findings involve conclusions which cannot logically stand together, and in this sense are inconsistent; yet they are not inconsistent in the sense that each requires the [3] rendition of a different judgment and thus mutually destroy each other. This is the test by which must be determined

the question whether the judgment as rendered should be allowed to stand. The findings are not so intimately connected that error in the one implies error in the other. Hence, if either be supported by the evidence, and it does not appear that substantial error intervened affecting it, the other may be regarded as immaterial. (*Dexter v. Codman*, 148 Mass. 421, 19 N. E. 517.) In this case it was said: "It is a mistaken assumption that the issues as to sanity and undue influence, in a case of this kind, are necessarily so connected that error in a finding upon one of them implies error in the finding upon the other. In many cases, perhaps in most, they are very closely connected. In some the connection is slight and unimportant. Where there is a close connection, sometimes it is such that an error in relation to the former would almost certainly involve an error in regard to the latter, while an error in regard to the latter would not be likely to affect the finding upon the former. Sometimes a very important part of the evidence of undue influence is the mental condition of the testator, and sometimes the proof comes chiefly from overt acts of coercive tendency. In the same case there may be evidence tending to show insane delusions affecting the disposition which a testator seeks to make of his property, and evidence of undue influence which has hardly any relation to his mental peculiarity. How far the fact that a jury has gone astray in dealing with one issue shall be deemed important in considering a motion to set aside their findings upon another must depend upon the relations of these issues to each other in the particular case, the evidence introduced upon each, and any facts and circumstances which throw light upon the nature or probable cause of the jury's mistake. And finally, each issue is to be dealt with by itself, in view of the evidence, and of all that has occurred in the course of the proceedings."

The court should have directed the jury to omit an answer to the second interrogatory if they should answer the first in favor of the plaintiff, and *vice versa*. But that this course was not pursued does not necessarily require a reversal of the judgment, if either finding is justified by the evidence. Moreover, this

contention, like the one first noticed, is made by way of suggestion during the course of the argument upon the sufficiency of the evidence. It is technical in character, is not based upon any special assignment of error, nor is it pointed out wherein any prejudice was wrought by the course pursued at the trial.

As to the mental capacity of the deceased: It would be impossible within reasonable limits to set forth and analyze in detail the large volume of evidence introduced at the trial. We shall therefore state our conclusions upon it, particularizing those portions of it only which we think require special notice.

The deceased was at the time of his death thirty-seven years of age. His father had been addicted to the use of alcoholic liquors prior to the birth of deceased, and was quarrelsome and abusive toward the plaintiff. Because of his abusive conduct on one occasion, when the deceased was about three years old, he was struck on the head with a stick of wood by a brother of the plaintiff. Subsequently he became insane and was confined in the asylum for the insane at Warm Springs, dying of dementia in 1907. The deceased was sober and industriously devoted himself to the business of stock-raising, with the result that at the time of his death he had accumulated a considerable estate. During the year 1907 the deceased began to show some eccentricities of conduct; but these are significant only when viewed in the light of subsequent events. They were not deemed significant at that time. In August, 1908, while engaged in stacking hay, he fell from the stack sustaining a severe injury to his head. Presently he apparently recovered. During the following October he, with others, accompanied a shipment of cattle, by way of Great Falls, to Chicago. Before reaching St. Paul he became violently insane. Put under the influence of narcotics after his arrival at St. Paul he became better and proceeded to Chicago. On the way he again became violent. Upon his arrival there he was put under treatment. The defendant, who had also gone to Chicago in the meantime, took charge of him and had him under restraint and treatment at different institutions in the city for some eight or ten days. Thereupon, his condition not improving, under the advice of physicians, she

took him to Portland, Oregon, about the end of October, being accompanied by her two sons, James Owens, a half-brother, and a trained nurse. During the greater part of the journey he was violent and had to be kept under restraint. He was kept in Portland in different institutions under treatment, most of the time at St. Vincent's Hospital, until March 3, 1909. At that time he was removed to a hospital in Spokane, Washington, suffering from dementia, where he remained until his death in November following. It is not controverted that for some time after he was first taken to Portland he was intermittently insane and at times not competent to attend to business. He was constantly under treatment by a physician at the hospital, and all of the time, including the months of November and December, was in charge of a nurse specially employed to attend him.

The foregoing is a summary of facts about which there is not, nor can there be, any controversy upon the evidence. Nor, do we think, is there any substantial ground for controversy that, up to about December 1, and after some time early in 1909, the deceased was not mentally competent to attend to business of any character. The testimony as to his condition after this time, and particularly on December 12, is conflicting. Charles Reed was an inmate of the hospital some time prior to and until December 12. He was employed as a nurse for deceased from November 25 until December 3. He testified: "When I first saw him [deceased], he was in an unconscious condition and in a strait-jacket lying in a cot on the floor. He was in a stupor or unconscious, and we took him that night to St. Vincent's Hospital. His condition from the 25th of November until the 3d of December, while I was attending him, was such that at times he was rational, and at other times he was unconscious, and other times he was strapped on the bed. He was in a strait-jacket several times; it was necessary to put him in a strait-jacket to keep him in bed. At times he would be delirious and moaning and others rational. I took an interest in him on account of him coming from Montana. I left the hospital on the 19th of December. Along about December 12, I would say he was in a kind of stupor and in an unconscious condition. He used to bump his head on

the floor. One night when I was nurse he got out of bed and bumped his head. He wouldn't say anything to anybody unless they would speak to him. * * * It was necessary to strap him to the bed because he was delirious and would not stay in unless he was strapped. * * * Along about the 12th of December Mr. Murphy seemed to be in a stupor. He would talk if you would talk with him; but, if you didn't talk with him, he would not say anything, but just lay there and gaze at you. I cannot say that he talked rationally at any time. His physical condition was pretty poor. He was between life and death at the time he was brought up to the Sisters' Hospital on November 25. At the time I found him he did not give evidence of having been cared for properly, because there was not the proper place to have the proper care. He was in a dirty condition. On or about the 5th of December he was rational at times, and there were other times that he was not; he was out of his mind entirely. He would be rational for an hour or two and then would sink down again."

Two physicians residing in Montana, who did not know deceased, called to express opinions based upon the facts shown in the evidence, stated that in their opinion the deceased was suffering from dementia, an incurable form of insanity; that, being so afflicted, he was not subject to lucid intervals; and hence that he was incompetent at the time the will was executed. Both qualified their opinions as to his competency on December 12, by saying that they did not care to be understood as contradicting any statements made in this regard by the physician who attended the deceased, inasmuch as a physician who had made personal inspection and examination was better qualified to speak as to the actual condition.

Counsel for appellant insist that, notwithstanding this evidence, no other conclusion can be drawn from the evidence as a whole than that on December 12, when the will was executed, the deceased was passing through a lucid interval which covered at least three weeks of the month of December, and that he not only fully understood the nature of his act in executing his will, but that, also, by doing it he accomplished the purpose which he had

theretofore often expressed his intention to accomplish, *viz.*, to make the defendant his sole beneficiary, subject to the condition that his mother should be given support out of his estate during her lifetime. It is true that the evidence introduced by defendant tends to show that the deceased, after his manifestations of mental derangement at St. Paul and Chicago and during the month of December, experienced lucid intervals, and that during these times he was apparently in full possession of his senses. It tends to show that he conversed with his nurse and the attendant physician at different times about his business affairs and his intentions with reference to a disposition of his property. Dr. Story, the attending physician, testified: "Edward Murphy was in my charge at Portland between November 27, 1908, and the last week of February, 1909, suffering from a deranged mental condition, not affecting his consciousness, but partly his mental understanding at times. His mind became rational and resumed its ordinary action some two or three weeks in December. He had lucid intervals lasting several days at a time, during which he seemed to be very much improved, and gradually improving under these conditions; that is, we hoped he would regain his faculties completely and permanently. * * * From the first week in December until toward Christmas, daily, when I saw him, he was rational and apparently improving. During this time he gave rational replies to all questions put to him by me. * * * I considered that at most of the time, from the first week of December until just before Christmas time, he was rational and able to intelligently direct his personal and business affairs. * * * Along the second week in December he wrote a letter to his mother, the composition of which was perfect and rational." Treatment was abandoned after the end of February because the condition of the deceased became hopeless.

The nurse, Anna Shannon, who was one of the attesting witnesses and who attended him from December 1 and for two weeks thereafter, stated that when she was employed he appeared to be at times mentally deranged, but during most of the time when she was with him he was rational; that his condition

constantly improved; and that, because he conversed with her intelligently about his business and upon other subjects, she was of the opinion that his mental condition was good. This witness was not examined with reference to the condition of the deceased on December 12. Her deposition had been taken in April, 1909, to be used upon an application by defendant, then pending in the district court of Lewis and Clark county, to have herself appointed guardian of the deceased as an incapable and insane person. It appeared at the hearing that defendant, whose fitness to act as guardian was contested by the plaintiff, had theretofore assumed control of the estate and business affairs of the deceased under a power of attorney executed by him on December 5, seven days before the execution of the will, and the special purpose of the deposition was to show that at the time of the execution of this instrument the deceased was mentally competent. Its office on that hearing was to show that deceased, at a time when he was competent to act for himself, had chosen defendant to act as his confidential agent, and hence that she was a fit person to be appointed his guardian. Except in her general statements as to the condition of the deceased during the month of December, she did not testify at all as to his condition at the date of the execution of the will. Nor was she cross-examined with reference to it.

Patterson, the other attesting witness, was examined at length. He had met the deceased, who had visited Portland in company with the defendant in March and May, 1908. He seems to have been an intimate acquaintance, the intimacy having been brought about by the fact that, during the visit just mentioned, the defendant and deceased had occupied a suite of rooms adjoining those occupied by the witness. When the defendant took deceased to Portland, the acquaintance was renewed, the defendant having put her two sons into the school in which the witness was a teacher. He testified in detail as to his observation of the deceased on the occasion of the several visits paid him at the hospital upon the invitation of defendant, from about November 25, 1908, until the latter part of the following January. During the month of January he met the deceased while walking in

company with the defendant and conversed with him. He visited the deceased at the hospital four times prior to December 12. He did not know, nor did he inquire, why the deceased was confined in the hospital under the care of a physician and nurse, except that he was told by the defendant that he was there because of an injury received from a fall from a haystack. He stated definitely that on none of these visits or meetings did he observe any evidence of mental derangement of the deceased, but that he appeared just as intelligent as he was upon his visit to Portland in May, 1908, and conversed generally as intelligently as he did then. He detailed with much particularity the circumstances attending the execution of the will. There were present Anna Shannon, the nurse, and, besides himself, his wife and mother. The will, theretofore prepared—by whom the evidence does not disclose—was read aloud by him to the persons there present. Thereupon the deceased said, "I think I have done the proper thing," looking interrogatively at the witness. The witness having replied, "Mr. Murphy, I think you have," the deceased said, "I think so." The instrument was then executed and attested and handed to Miss Shannon by the deceased, for safekeeping. The testimony of two sons of the defendant who, though not present at the time of the execution of the will, saw their uncle frequently, was substantially to the same effect.

Mr. Cavanaugh, an attorney who prepared the power of attorney executed on December 5, testified, in effect, that at the time he questioned the deceased particularly in order to ascertain whether he fully understood the nature of his act, and became satisfied that he did, or otherwise he would not have permitted the execution of the instrument.

There is not any evidence in the record showing that the deceased ever, after his attack at Chicago, attempted to transact business of any kind, other than to execute the power of attorney and the will.

The theory of counsel for defendant is that the burden of showing that at the time the will was executed the deceased was not competent was upon the plaintiff; that the evidence intro-

duced by her is not sufficiently substantial in character to produce moral certainty in an unprejudiced mind—in other words, is only slight evidence—and hence that the findings of the jury must have been in favor of the defendant. We concede that the evidence is not as satisfactory as it might be. We agree that the right to make disposition of one's property by will is a right guaranteed by law, and is as valuable as any other property right; that the beneficiaries under a will are entitled to protection just as are other property owners; that jurors are often inclined to disregard the evidence and to set aside a will upon some excuse found outside of the evidence, because the dispositions made by the testator do not comport with their personal [4] notions of what is just and proper; and that in all such cases it is incumbent upon the court not to permit a will to be set aside except upon substantial evidence tending to show that it is not in fact the will of the testator. (*In re Noyes' Estate*, 40 Mont. 178, 105 Pac. 1013; *Schmidt v. Schmidt*, 201 Ill. 191, 66 N. E. 374; *In re McDevitt's Estate*, 95 Cal. 17, 30 Pac. 101.) Yet, as pointed out by this court in *Re Noyes' Estate, supra*, in a will contest the finding of the trial judge or jury, as the case may be, cannot be disturbed on appeal if there is any substantial evidence to support it. As in any other case, substantial evidence tending to show lack of testamentary capacity, or any other fact invalidating a will, is sufficient to go to the jury, though it be controverted by countervailing evidence. The evidence in this case, the salient points of which have been set forth above, makes such a case.

It is not controverted that the deceased became insane during the month of October, and remained so intermittently during the month of November. There is some direct evidence—that of the witness Reed—that he remained in this condition well into December, and that he was in an apparent stupor and in an unconscious condition on or about December 12. Two physicians were of the opinion that he was suffering from an incurable insanity and not subject to lucid intervals. It is not controverted that in the early part of the year 1909 he became permanently insane from dementia and remained so until his death. During

all the time he was in a hospital in charge of a nurse and under treatment for mental derangement. His somewhat extensive property was apparently left to the control of others. Counsel say that the evidence of the witness Reed should be entirely disregarded, because he not only exhibited personal interest in the case by his manifest hostility toward defendant, but confessed that he is an ex-convict, having served a term in the state prison for larceny. It is said, also, that the testimony of the two local physicians is not entitled to any weight because they had not made personal examination of the deceased, and because expert testimony is at best not worthy of much credit.

The testimony of Reed and that of the physicians aside, they insist that the testimony of Dr. Story and that of the witness Patterson is uncontradicted and should have been deemed conclusive. The testimony of these witnesses, however, was competent. The weight to be given it was for the jury to determine; so, also, in the light of all the attendant circumstances, the credibility of the testimony of Dr. Story and the witness Patterson was for the jury to determine. The question as to who should sustain the burden of proof we shall consider when we come to examine the instructions submitted to the jury.

Upon the issue of undue influence, a great deal of evidence other than that summarized above was introduced. We shall not undertake a discussion of it. We are satisfied, however, that, taking into consideration the intimate confidential relations shown to have existed between the defendant and the deceased, the weak mental condition of the latter, assuming that he was mentally competent notwithstanding his condition, together with all the other circumstances, a case was made sufficient to go to the jury within the definition of "undue influence," as declared by the statute. (Rev. Codes, sec. 4981.) Upon another trial, which we must order because of error in the instructions, the trial court should bear in mind that undue influence cannot, in a legal sense, be exerted upon a person who is destitute of testamentary capacity, and submit the findings to the jury with explicit directions, in accordance with the suggestions heretofore made.

Complaint is made that the court erred in submitting the following instructions:

"(4) The court instructs you that all persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity."

"(6) The court instructs you that where insanity in the testator has been shown to exist at a time previous to the execution of the will, and is also shown to exist at a time subsequent to the execution of the will, the proponent of the will is then bound to show that it was executed at a time when the testator was of sound and disposing mind."

The criticism of instruction 4 is that it states the test by which ability to form a criminal intent is to be determined, and is therefore inapplicable to a case such as this, involving an inquiry as to mental capacity of an alleged testator, because it takes less mental capacity to make a will than it does to form a criminal intent. The instruction is taken from section 8113, Revised Codes. It states the presumption which prevails at the outset in every criminal case: That the defendant is sane until the contrary appears. As counsel say, it has no reference to the extent of mental capacity necessary to enable one to enter into a valid [5] contract or make a will. Neither has it reference to the extent of mental capacity required for any other purpose. It states only the presumption which attaches generally to human conduct in the relations of life. There was therefore no error in giving it, although, perhaps, in the form in which it is stated, its meaning was not apprehended by the jury.

Instruction No. 6 is clearly erroneous. In effect it told the jury to find for the plaintiff if the evidence showed that the deceased was insane at any time prior to December 12, and at any subsequent time, unless the defendant had sustained the burden of showing by preponderating evidence that he was sane, and therefore competent at the time he executed the will. The burden of proof was thus cast upon the defendant.

Evidently the court had in mind the presumption mentioned in section 7962, subdivision 32, Revised Codes: "That a thing once proved to exist continues as long as is usual with things of

that nature." This presumption does not apply regardless of the nature of the thing or condition in question. It applies [6] only to those conditions which from their nature must continue for some appreciable length of time. (*Scott v. Wood*, 81 Cal. 398, 22 Pac. 871.)

Lunacy, or insanity, if of a general, habitual, or permanent nature, once shown to exist, is presumed to continue until the presumption is overturned by countervailing evidence. This rule is recognized by the courts generally. (*In re Brown*, 39 Wash. 160, 109 Am. St. Rep. 868, 81 Pac. 552, 1 L. R. A., n. s., 540, 4 Am. & Eng. Ann. Cas. 488, and notes; 16 Am. & Eng. Ency. of Law, 2d ed., 604.) Where its existence is made to appear, the presumption referred to attaches; for we know from experience [7] that the condition usually continues. But to cases of intermittent or occasional insanity it can have no application, because in the very nature of things the idea of continuity is excluded. So that, when this is the condition, proof of its existence at one time raises no presumption that it existed either at an antecedent or subsequent time. The question for determination is: Was the testator of sound mind at the time the will was executed? If he was, his precedent and subsequent condition is immaterial. (See cases cited in note to *In re Brown, supra*; Beach on Wills, sec. 98; *Bundy v. McKnight*, 48 Ind. 502; *People v. Francis*, 38 Cal. 183; *Heirs of Clark v. Ellis*, 9 Or. 128; *In re Carithers*, 156 Cal. 422, 105 Pac. 127; *Murphree v. Senn*, 107 Ala. 424, 18 South. 264; *Turner v. Rusk*, 53 Md. 65; *In re Nelson's Estate*, 132 Cal. 182, 64 Pac. 294.) The most that can be said of the evidence in this case is that it presented a controversy as to whether prior to December 12 the insanity of the deceased was general and habitual, or whether it was intermittent only.

Under the statute the contestant occupies the position of plaintiff. (Rev. Codes, sec. 7397.) He has the affirmative of the issue and must prove it or be defeated. (Section 7972.) The procedure to be observed in this class of cases is pointed out in *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319. The trial is initiated when the formal preliminary proof of the execution of the will is before the court; that is, formal proof

that the testator was of sound and disposing mind, and that the formalities required by the statute were observed. Proof of these facts having been made, the order admitting the will to probate follows as a matter of course, but for the contest. There-
[8] upon the general burden is upon the contestant throughout to establish, by a preponderance of the evidence, the facts upon which he relies to have it set aside. Of course, when he has made out a *prima facie* case, the burden is cast upon the proponent to furnish rebutting proof, but he is not required to do more than this; and, if in the end the contestant has not sustained the burden, his contest must fail. (*Estate of Dolbeer*, 149 Cal. 227, 86 Pac. 695.) The instruction, given as it was, without qualification, in effect assumed that the mental condition
[9] of the deceased prior to December 12 was general and habitual; whereas, the evidence was in direct conflict. It thus invaded the province of the jury. Again, in instruction 12 the court correctly declared the rule which the jury should observe in reaching their verdict, telling them that the burden was upon the contestant throughout. Instruction No. 6 is in direct conflict with this. For these errors the defendant is entitled to a new trial.

Errors are alleged upon the giving of other instructions and a refusal to give one requested by the defendant. But what has already been said fully disposes of the contentions made in respect of them. The errors alleged upon the admission and exclusion of evidence are not of sufficient merit to demand special notice.

The hypothetical question submitted to Dr. Scanland recited one fact not shown by the evidence; but this was not of material import. For this reason the question is subject to criticism,
[10] but otherwise it comes within the recognized rule. (*State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *Carman v. Montana C. Ry. Co.*, 32 Mont. 137, 79 Pac. 690.)

The plaintiff has submitted under the provisions of the statute (Rev. Codes, sec. 7118) the ruling of the court in admitting
[11] over her objection the deposition of Anna Shannon, heretofore referred to, and those of other witnesses taken to be used

in the guardianship proceedings in April, 1909. They were admitted upon the assumption that this controversy is one between the same parties and involving the same subject matter. This was error. The statute provides: "When a deposition has been once taken, it may be read by either party in any stage of the same action or proceeding, or in any other action between the same parties upon the same subject, and is then deemed the evidence of the party reading it." (Rev. Codes, sec. 8010.) The questions involved upon that application were whether the deceased was insane at that time, and whether the defendant was a suitable person to act as his guardian. There was no controversy upon the question of insanity. The several witnesses were neither examined nor cross-examined as to the mental condition of the deceased at the time the will was executed. Upon such an application the adversary parties are the petitioner and the alleged incompetent. (Rev. Codes, sec. 7764.) In this case the parties are not the same, nor is the subject matter the same. Depositions of witnesses, whether residing within or without the state, must have been taken upon the issue on trial, in the manner provided by the statute, upon notice to the adversary party and full opportunity accorded for cross-examination. Otherwise, as to him, they are merely *ex parte* affidavits and are not admissible against him.

The infirmity attaching to these depositions is that they were not taken to sustain any issue in this case; nor was there the opportunity for cross-examination which the law contemplates. They were not admissible from any point of view, even though the plaintiff did contest the fitness of the defendant to be appointed the guardian of her brother. The statute (Rev. Codes, sec. 7118, *supra*) requires this court to review the errors made, not only against the appellant, but also those made in his favor, if they are made to appear in the record by bill of exceptions, and prohibits the reversal of the judgment upon any error complained of by the appellant, if, but for the error against the respondent, the result of the trial would have been the same. As we have seen, a new trial of this case must be ordered for error which the error in the ruling in question cannot compensate.

We have deemed it necessary to state our conclusion with reference to it in order to prevent a repetition of it upon the next trial.

In the trial of this case the procedure outlined in *Farleigh v. Kelley, supra*, was entirely overlooked. Upon another trial the court should observe it and thus avoid much of the confusion which attended the former trial.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

Rehearing denied June 22, 1911.

THERRIAULT, RESPONDENT, v. ENGLAND ET AL., APPELLANTS.

(No. 2,984.)

(Submitted May 13, 1911. Decided May 27, 1911.)

[116 Pac. 581.]

Personal Injuries—Master and Servant—Negligence—Proximate Cause—Minors—Duty to Warn—Contributory Negligence.

Personal Injuries—Negligence—Proximate Cause—What Constitutes.

1. To enable plaintiff in a personal injury action to recover damages, he must show that the negligence charged was a proximate cause of the injury, i. e., a cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produced the injury, and without which it would not have occurred.

Same—Proximate Cause—What Does not Constitute.

2. A cause which, in intervening between defendant's negligence and plaintiff's injury, will break the chain of sequence of the former's wrongful act and relieve him from liability therefor, is one which could not have been foreseen or anticipated by him as a probable consequence of his negligence.

Same—Negligence—Proximate Cause—Evidence.

3. Plaintiff, a minor, was employed by defendant members of a gun club to load the automatic traps used to propel clay pigeons. His place of employment was in a newly constructed traphouse, the back of which, composed of rough boards closely fitted together, faced the shooters. Between the date of its construction and the accident a

crack about one-eighth of an inch wide appeared between two boards forming the back, of the existence of which defendants, however, knew nothing. Plaintiff relinquished his post of duty at the traps to a boy friend and proceeded to look at the shooters through the crack; while doing so, scattering shot struck him in the face, causing the injuries complained of. Held, that defendants' negligence was not the, or a, proximate cause of plaintiff's injury, but that plaintiff's own act intervened to make possible the resulting injury.

Same—Contributory Negligence.

4. Plaintiff not having been engaged in the discharge of his duties at the time of his injuries, but having voluntarily placed himself in a known situation of danger to satisfy his curiosity, was not in any position to recover compensation from his employers.

Same—Minors—Contributory Negligence—Infancy.

5. Plaintiff, having negligently exposed himself to a danger which he fully understood and appreciated, the fact that he was a minor and "did not think about" the danger at the time the accident happened did not excuse him from the consequences of his negligent act.

Same—Minors—Duty of Master to Warn.

6. Where a minor servant has knowledge of all the facts concerning his employment and appreciates the dangers surrounding it, forming a correct judgment upon them, his master is not under any obligation to warn him with respect to them.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by Alban Therriault, through Severin Therriault, his guardian *ad litem*, against Orville England and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Mr. H. H. Parsons, and Messrs. Hall & Patterson, submitted a brief in behalf of Appellants. *Messrs. Parsons and Patterson* argued the cause orally.

There is a variance between plaintiff's complaint and the evidence, amounting to a failure of proof. He can recover only on the facts alleged. (*Flaherty v. Butte Elec. Ry.*, 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 416; *Thurman v. Pittsburg & Mont. Co.*, 41 Mont. 141, 108 Pac. 588; *Forsell v. Pittsburg etc. Co.*, 38 Mont. 403, 100 Pac. 218; *Bracey v. Northwestern I. Co.*, 41 Mont. 338, 137 Am. St. Rep. 738, 109 Pac. 706.) If he sought to recover for an injury received out of the line of his employment, he must so allege in his complaint. (*County v. Wright*, 16 Ind. App. 630, 45 N. E. 817.) On the contrary, where he seeks to recover for an injury received in the line of his employ-

ment, he must state facts showing that also. He must allege and show that he was acting within the scope of his employment. (*Stagg v. Spice Co.*, 169 Mo. 489, 69 S. W. 391; *Branham v. Cotton Mill*, 61 S. C. 491, 39 S. E. 708; *S. B. Plow Co. v. Cissne*, 35 Ind. App. 373, 74 N. E. 282; *Railway v. Lightheiser*, 163 Ind. 247, 71 N. E. 218, 660; *Mackey v. Mill Co.*, 210 Ill. 115, 71 N. E. 448; *Adams v. Railway*, 166 Ala. 449, 51 South. 987; *Railway v. Perkins*, 171 Ind. 307, 86 N. E. 405.)

Plaintiff was guilty of the grossest contributory negligence. If he was not so guilty, we admit our inability to conceive a case of contributory negligence. The danger of sticking a red-hot poker in his eye and the resultant injury was, and is, no more palpable, plain and obvious than looking into the bore of a shotgun when it is turned toward the crack through which he was deliberately and steadfastly gazing. The comment of the court in the case of *Bulkley v. Manufacturing Co.*, 113 N. Y. 540, 21 N. E. 717, is pertinent here. (See, also, *Levey v. Bigelow*, 6 Ind. App. 677, 34 N. E. 128; *Forquer v. Slater Brick Co.*, 37 Mont. 447, 97 Pac. 843.)

Plaintiff knew and comprehended every danger and risk that an adult could have known and appreciated. This being so, he is chargeable with contributory negligence, just as much as an adult would have been. "If he had the knowledge of the situation and the intelligence to appreciate the dangers thereof, his minority cannot shield him from the consequences of his negligent acts." (*Railway v. Rogers*, 89 Tex. 675, 36 S. W. 243; *Railway v. Phillips*, 91 Tex. 278, 42 S. W. 852; *Freeman v. Garcia* (Tex. Civ. App.), 121 S. W. 886; *Krisch v. Richter* (Tex. Civ. App.), 130 S. W. 186; *Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 360; *Sanborn v. Railway Co.*, 35 Kan. 292, 10 Pac. 860; *Wight v. Railway Co.*, 161 Mich. 216, 126 N. W. 414; *Cudahy Co. v. Marcan*, 106 Fed. 645, 45 C. C. A. 515, 54 L. R. A. 258.)

Where one is injured by reason of his placing himself in a position of danger, not naturally incident to the performance of his duties, or where he goes outside the scope of his employment and is injured, he cannot recover. He is chargeable with

contributory negligence as a matter of law. (*Morewood Co. v. Smith*, 25 Ind. App. 264, 57 N. E. 199; *Lynch v. City*, 37 Wash. 657, 80 Pac. 79, 12 L. R. A., n. s., 261; *Worthington v. Goforth*, 124 Ala. 656, 26 South. 531; *Grunert v. Spalding*, 104 Wis. 193, 80 N. W. 589; *Spencer v. Tile Co.*, 107 Minn. 403, 120 N. W. 370, 687; *Lumber Co. v. Brandvold*, 141 Fed. 919, 73 C. C. A. 153; *Fritz v. Gas Co.*, 18 Utah, 493, 56 Pac. 90.)

The adjudicated cases are to the effect that in a case like the one at bar, where the risk and the danger are both palpable and plain, as well as comprehended and understood, the risk is assumed. (*Kuphal v. Western Montana Flouring Co.*, 43 Mont. 18, 114 Pac. 122.)

When the risk and the hazard are once appreciated by a minor, his thoughtlessness or inattention neither excuse nor avail him. (*Morewood Co. v. Smith*, 25 Ind. App. 264, 57 N. E. 199; *Coonce v. National Bis. Co.*, 115 Mo. App. 629, 92 S. W. 352; *Betz v. Winter*, 195 Pa. 346, 45 Atl. 1068; *Walker v. Scott*, 67 Kan. 814, 64 Pac. 615; *Coal Co. v. Barringer*, 218 Ill. 327, 75 N. E. 900.)

Mr. John H. Tolan, for Respondent, submitted a brief and argued the cause orally.

The question of variance, not having been presented to the court below, may not now be considered upon this appeal. (*Robinson v. Helena Light & Ry. Co.*, 38 Mont. 222, 99 Pac. 838; *Nord v. Boston B. M. C. C. S. Co.*, 30 Mont. 48, 73 Pac. 681; *Dawes v. Great Falls*, 31 Mont. 9, 77 Pac. 309.) However, there was no variance. The cause of action is proven substantially as alleged. (*Frederick v. Hale*, 42 Mont. 153, 112 Pac. 72; *Vreeland v. Edens*, 35 Mont. 413, 89 Pac. 735; *Robinson v. Helena Light & Ry. Co.*, *supra*.) The gist of the action is the negligent construction, maintenance and condition of the trap-house, the failure to inspect and repair, allowing plaintiff to be employed therein without repairing, inspecting or warning him. This cause of action is not changed by the testimony introduced. That there is no merit in the contention, see *Vindicator Con. G. M. Co. v. First Brook*, 36 Colo. 498, 86 Pac. 313, 10 Am. & Eng.

Ann. Cas. 1108; *Jones & Adams Co. v. George*, 227 Ill. 64, 81 N. E. 4, 10 Am. & Eng. Ann. Cas. 285.

Appellants contend that when plaintiff left his seat back of the trap he went beyond the scope of his employment; also, that by leaving the place back of the trap, he ceased to be in the employ of defendants. The decisions do not uphold the contentions of counsel. (*Moyse v. Northern Pac. Ry. Co.*, 41 Mont. 272, 108 Pac. 1062; *Hollingsworth v. Davis-Daly Estates etc. Co.*, 38 Mont. 143, 99 Pac. 142; *Parkinson v. Riley*, 50 Kan. 401, 34 Am. St. Rep. 123, 31 Pac. 1090; *Broderick v. Detroit R. S. & D. Co.*, 56 Mich. 261, 56 Am. Rep. 382, 22 N. W. 802; *Taylor v. Bush & Sons Co.*, 6 Penne. (Del.) 306, 66 Atl. 884, 12 L. R. A., n. s., 853; *International G. & R. Co. v. Ryan*, 82 Tex. 565, 18 S. W. 219; *Dischon v. Cincinnati etc. Ry. Co.*, 126 Fed. 194; s. c. 133 Fed. 471, 66 C. C. A. 435; *Ellsworth v. Metheney*, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389.)

The questions of assumption of risk, appreciation of risk and contributory negligence were questions for the jury. (*Osterholm v. Boston & Montana C. & M. Co.*, 40 Mont. 508, 107 Pac. 499.) To hold that the plaintiff was precluded from recovery because of assumption of risk, it was necessary that the testimony should disclose, not only that he knew all physical conditions surrounding him, but that he knew and appreciated the danger therefrom. (*Longpre v. Big Blackfoot Milling Co.*, 38 Mont. 99, 99 Pac. 131; *Anderson v. Northern Pac. Ry. Co.*, 34 Mont. 182, 85 Pac. 884; *Stevens v. Elliott*, 36 Mont. 92, 92 Pac. 45; *Forquer v. Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843; *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29; *Lahti v. Rothschild et al.* (Wash.), 111 Pac. 451.)

Upon the question whether or not a nonsuit should have been granted, we submit the following: "Upon a motion for a nonsuit, those facts will be deemed proved which the evidence tends to prove." (*Roach v. Rutter*, 40 Mont. 167, 105 Pac. 555; *Anderson v. Northern Pac. Ry. Co.*, *supra*.) If, upon this question, different men of fair, sound minds draw different conclusions, then the question must be submitted to the jury.

(*O'Brien v. Corra Rock Island M. Co.*, 40 Mont. 212, 105 Pac. 724.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In March, 1909, the defendants in this action and certain other individuals composed the Missoula Gun Club, a voluntary association formed for the purpose of practicing shooting at inanimate targets. The associated members were in possession of certain grounds, traphouses, warehouses, and other paraphernalia where their practice was carried on. Three or four days prior to the accident, a new traphouse had been constructed, and in it installed an automatic trap for throwing the clay targets. The trap itself was set in the ground about two feet, and was operated by a loader who sat behind it, placed the target in position, and then fixed the angle at which it should be discharged by working the trap with his feet. The trap was actually sprung and again placed in position to be loaded by a man who stood on the outside of the traphouse behind the shooters, and worked a lever connected with a rod which in turn connected with the trap. The shooters stood about sixteen yards from the traphouse, and shot directly over it, or to one side or the other, according as the target was discharged directly from the trap or at an angle. On March 21, 1909, these defendants were at these grounds, practicing. They employed the plaintiff to load and work the trap, and this work required him to be in the traphouse. During the course of the day a Mrs. Stephens, a guest of the members, undertook to shoot. The gun which she held was prematurely discharged. Some shot passed through a crack in the back of the traphouse, and penetrated the face of plaintiff, causing injuries. This action was commenced by the plaintiff, through his guardian, to recover damages on the ground of negligence. The defendants answered, denying any negligence, and pleading affirmatively contributory negligence and assumption of risk. The trial resulted in a verdict and judgment in favor of plaintiff, and from that judgment and an order denying them a new trial defendants have appealed.

The position taken by the appellants and our own conclusion upon the entire case have led us to assume some of the facts stated which might otherwise be considered in dispute. There is not any substantial controversy in the evidence upon any of the material matters. The record discloses that the traphouse was constructed of rough lumber, two inches thick; that the boards fitted so closely together that the light would not penetrate through the cracks where they joined; that the house was six or seven feet in extent, facing the shooters. This side is called the back of the house, was three and one-half or four feet high, and covered. The other dimensions are not material. The trap was placed to the left of the center of the house, and the loader sat directly behind it to load and determine the angle. It appears that between the date of the construction of the house and the day of the accident a crack appeared between two boards forming the back, caused probably by a board warping or shrinking somewhat. This crack extended for eight or ten inches to the right of the center of the back, and was about one-eighth of an inch wide. It was so narrow that, in order to see through it and distinguish objects, it was necessary to get the eye directly up to the crack. When the gun held by Mrs. Stephens was discharged, a few No. 7½ shot passed through the crack, but the crack was so narrow that each shot grooved the board above and below. These shot were the ones which caused the injury to plaintiff.

1. It is elementary that, in order for plaintiff to recover, he must show that the negligence charged was a proximate cause of his injury. "*Causa proxima, non remota, spectatur.*" In *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 129 Am. St. Rep. 659, 100 Pac. 971, this court defined "proximate cause" as follows: "The proximate cause of an injury is that which in a natural [1] and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred."

In the complaint it is alleged that plaintiff was injured "while inside said traphouse, and then and there engaged in the performance of his duties in loading the trap." And, again, it is

said that, when he was injured, he "was then and there busily engaged with his duties in loading the trap with targets."

The evidence discloses without contradiction these facts: The practice by the members of the club was over when the defendant Steinbrenner went to the traphouse and spoke to the plaintiff, who left his position behind the trap, and told him to set the trap to throw the targets straight away, as some women were going to shoot; that the trap was then loaded; that, when plaintiff returned, another boy, Frank Shunk, had taken plaintiff's position behind the trap; that plaintiff stood to the right of Shunk and to the right of the center of the house, and soon afterward turned and saw this opening in the back wall or the wall which was intended to protect him from the shooters, and looked out through it, turned away, and soon thereafter again placed both eyes up to the opening, looked out, saw a woman standing back at the shooters' position, and while thus engaged was injured. It may be conceded that but for the opening the injury would not have occurred; but this alone is not sufficient. It must appear that the discharge of the shot through this opening would have produced the injury or, in other words, that there was not any new, independent intervening agency. In *Mize v. Rocky Mt. Bell. Tel. Co.*, above, in discussing the subject of an intervening cause, this court said: "What intervening [2] cause will break the chain of sequence and so far insulate the first wrongdoer's negligence from the injury as to relieve such wrongdoer? * * * The test is not to be found in the number of intervening events or agencies, but in their character and in the natural connection between the wrong done and the injurious consequence; and, if such result is attributable to the original negligence as a result which might reasonably have been foreseen as probable, the liability continues. What ought to be foreseen or anticipated as the probable consequence of the wrongdoer's negligence? In the first instance, it is not necessary to show that he ought to have anticipated the particular injury which did result; but it is sufficient to show that he ought to have anticipated that some injury was likely to result as the reasonable and natural consequence of his negligence.

This is the meaning of section 6068 of the Revised Codes, and expresses the rule announced by this court in *Reino v. Montana M. L. Dev. Co.*, 38 Mont. 291, 99 Pac. 853."

Can it be said, then, that these defendants ought to have anticipated that some injury was likely to result to plaintiff, [3] assuming that they knew of the existence of the opening? The plaintiff was employed to perform certain duties, and the performance of those duties while the shooting was in progress required him to occupy a position behind the trap and away from the opening. A witness for the plaintiff testified in response to questions, as follows: "Q. I will get you to tell the jury in what position a person in that traphouse would have to be, the shot coming from that way, the traphouse facing this way, in what position a person would have to be to receive the shot through that crack where the curve was, in the left eye, the left temple, and nose? A. He would have to be sitting or stooping in the traphouse like this, with his head down, looking at that crack. It would not be possible for a person sitting where the duty of the trap setter caused him to be, in that traphouse, straddle of the trap, to be shot in the face or head at all, or any other part of the body. There was not any duty or anything that required this boy on that Sunday to be in a position over to the right-hand side of the traphouse with his face to that crack. Q. If he had been in attendance, in the execution of his duty, he would have been sitting down straddle of that trap, with his back to the shooter and his face in the same direction in which the shot was going? A. Yes, sir; and in that position it would have been impossible for him to have been injured as he claimed in his complaint." This evidence was given by plaintiff's own witness, and is not contradicted or modified at all. It cannot be said, then, that the defendants ought to have anticipated that plaintiff would be doing anything other than that required by his duties, or that he would be at any place in the traphouse other than at the trap when the shooting was in progress; and it cannot be said that they ought to have anticipated that some injury to plaintiff was likely to result as the reasonable and natural consequence of the existence of the opening and people shooting

over it. It must be, then, that the negligence of defendants, assuming they were negligent, was not the proximate, or a proximate, cause of the injury, but that some independent cause intervened to make possible the injury which resulted.

2. The evidence discloses that the boy Shunk went into the traphouse without the knowledge of any of the defendants, but with the permission of the plaintiff, and was told by plaintiff that he might load the trap for a time. It appears from plaintiff's own testimony that at the time of his injury he was sixteen years of age; that for four years or more he had been engaged in loading traps during the spring, summer, and fall of each year; that he was familiar with the use of firearms and understood and appreciated the dangers arising from their use; that he knew defendants and their guest were using shotguns for practice there at that time; that he knew that the load scatters after leaving the muzzle of a shotgun; that he knew that shot had scattered and lodged in the back of the traphouse before the time Mrs. Stephens undertook to shoot; that he knew and appreciated the fact that the house was for his protection, and so jealous was he of his own safety that he would not leave the house until he had attracted the notice of the shooters and someone had come to his relief, and would not even place his hand outside of the house for fear of having it shot; that while looking out through the opening he was expecting every moment that the trap, which was loaded, would be sprung by the man from the outside, and that a shot would be fired directly over the house. As a part of his cross-examination he testified: "Q. While you were expecting this shot, you turned around, looked through the crack to see what you could see? A. Yes, sir. Q. Who could you see through that crack at that time? A. Saw a lady standing there; just a second, that is all. * * * Q. You knew when you looked back there that, if somebody happened to shoot just as you looked back, you might get hit in the eye with the shot? A. I knew it, but I didn't think about it. * * * Q. You had seen through this crack once? A. Yes, sir. Q. And you wanted to see through it again? A. Take a good look, I guess.

* * * Q. You wanted to get as good a look as you could and you thought you would have time to look, and you looked at the crack; just at the time something hit you, is that true? A. Yes, sir. * * * I turned away around the second time. Q. Looked out with both eyes the second time? A. Yes, sir. I just took a glimpse the first time. The second time I just turned right around, with both of my eyes to the crack."

The evidence is conclusive of the fact that at the time he was injured plaintiff was not engaged in the discharge of his duty. [4] Even though he had a right to be in any part of the house, if his duty so required, yet there was not any duty connected with his work which could possibly call him into the position he occupied at the opening when he was injured. The shooting was in progress. He knew that a shot was about to be fired, and at such time his duty called him to a position directly back of the trap; but, prompted by idle curiosity, he placed himself in a known situation of danger, and but for his act he would not have been injured. Under these circumstances he cannot recover. (1 Labatt on Master and Servant, sec. 333; *Morewood Co. v. Smith*, 25 Ind. App. 264, 57 N. E. 199; *Lynch v. North Yakima*, 37 Wash. 657, 80 Pac. 79, 12 L. R. A., n. s., 261; *Wight v. Michigan Central R. Co.*, 161 Mich. 216, 126 N. W. 414; 1 Thompson's Commentaries on the Law of Negligence, sec. 186.) For, after all else is said, the facts remain that, if plaintiff had not been at the crack or opening, he would not have been injured, and that he had no business at the opening at all.

That the plaintiff knew and fully understood and appreciated the danger of looking out through the opening cannot be in [5] doubt; and under such circumstances, the fact that he was a minor cannot excuse him. In *Krisch v. Richter* (Tex. Civ. App.), 130 S. W. 186, the general rule is stated as follows: "If he [plaintiff] had the knowledge of the situation and the intelligence to appreciate the dangers thereof, his minority cannot shield him from the consequences of his negligent acts." To the same effect is 4 Thompson's Commentaries on the Law of Negligence, section 4095. Neither is it any excuse for plaintiff to say, as he does here in effect, "I knew the danger, but I did not think

of it at the time" (1 Labatt on Master and Servant, sec. 281), since he was not engaged in the discharge of his duties when injured, and therefore cannot bring himself within the exception announced by this court in *Anderson v. Northern Pacific Ry. Co.*, 34 Mont. 181, 85 Pac. 884.

3. It is insisted that the defendants should have warned the plaintiff, and, in failing to do so, were guilty of negligence. The duty of warning implies knowledge of danger, and a warning in this instance would have implied knowledge of the existence of the opening; while, in fact, there is not any evidence that any one of the defendants knew of the opening, but, on the contrary, the evidence, so far as it goes, discloses that they did not know the opening was there, and, of course, if they did not know of its existence, they could not warn against the danger arising from it. But, assuming that they did know of its existence or that the duty to warn may arise from knowledge implied, what warning could the defendants have given the plaintiff? They might have said to him: "There is an opening in the back of the traphouse to the right of the center and to the right of your place of work. Some women are going to shoot at targets thrown straight ahead, and therefore will shoot directly toward and over the house and the opening. The guns may scatter, and stray shot may pass through the opening. Don't leave your place of work and look out through the opening or shot may strike you in the face or eyes, and, if they do, you will be injured, probably seriously." In 4 Thompson's Commentaries on the Law of Negligence, section 4055, the rule of duty is stated as follows: "Generally speaking, an employer is bound to warn and instruct his employees concerning dangers known to him, or which he should know in the exercise of reasonable care for their safety, and which are unknown to them, or are not discoverable by them in the exercise of such ordinary and reasonable care as, in their situation, they may be expected and required to take for their own safety; or concerning such dangers as are not properly appreciated by them, by reason of their lack of experience, their youth, or their general incompetency or ignorance." The plaintiff knew that the opening was there, and had looked out through before he

was hurt. He knew the location of the opening with reference to the position of the trap. He knew that women were going to shoot. Steinbrenner had told him only a few moments before, and he remembered the information given. He knew that they were to shoot directly over the traphouse, for he had set the trap at the directions of Steinbrenner. He testified that he knew that these shotguns scatter, and that shot sometimes imbedded in the back of the traphouse. He knew that, if the gun scattered, stray shot were likely to come through the opening. He knew that, if shot came through and struck him, he would be injured. He knew all the facts of which the defendants could possibly have been possessed, and his judgment upon them was correct. Under these circumstances, there cannot be any [6] difference of opinion that plaintiff fully understood and appreciated the danger, and, with this knowledge and appreciation, there was not any duty imposed upon the defendants to warn him. (*Forquer v. Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182, 4 Am. St. Rep. 307, 15 N. E. 579; *Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 360; 4 Thompson's Commentaries on the Law of Negligence, sec. 4095.)

While it is of the utmost consequence that a minor servant should have full knowledge and appreciation of the dangers connected with or surrounding his employment, it does not follow necessarily that the master must instruct him. If he has the knowledge and appreciation of the danger, it is wholly immaterial whether his knowledge and appreciation are gained from his own observations and experience, from information and advice given him by others, or from warning and instructions of his master. (*Kuphal v. Western Mont. F. Co.*, 43 Mont. 18, 114 Pac. 122.) Whether we assume that the defendants were negligent in some of the particulars charged, and that plaintiff was guilty of contributory negligence, or treat the evidence as showing that plaintiff's negligence was the sole efficient cause of his injury, the result is the same. Upon the record presented, the trial court should have directed a verdict for the defendants, as it was requested to do.

The judgment and order are reversed and the cause is remanded, with directions to set aside the judgment and dismiss the action.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing denied June 22, 1911.

STATE EX REL. WYNNE, APPELLANT, v. EXAMINING AND TRIAL BOARD ET AL., RESPONDENTS.

(No. 2,978.)

(Submitted May 10, 1911. Decided May 27, 1911.)

[117 Pac. 77.]

Cities and Towns—Police Department—Metropolitan Police Law—Officers—Misconduct in Office—Evidence—Defenses.

Officers—Misconduct in Office—What Constitutes.

1. Any act involving moral turpitude, or any act which is contrary to justice, honesty, principle or good morals, if performed by virtue of office or by authority of office, is included in a charge of misconduct in office.

Same—Police Force—Illegal Mileage—Misconduct in Office—Evidence—Sufficiency.

2. Evidence held sufficient to support a finding that relator was guilty of misconduct in his office of chief of police in claiming and collecting mileage fees for services performed by one of his subordinates, relator paying to the latter his actual traveling expenses and retaining for himself the balance of the total amount received.

Same—Good Faith—Custom—Defenses.

3. That relator acted in good faith in claiming mileage, and the alleged fact that the method pursued by him in the premises was one in general vogue, did not constitute any defense.

Same—Improper Motives—Defenses.

4. Improper motives on the part of the examining and trial board of the police department in preferring charges against relator held immaterial under the circumstances.

Appeal from District Court, Silver Bow County; John B. McClellan, Judge.

CERTIORARI by the state on the relation of E. W. Wynne to review the action of the examining and trial board of the police

department of the city of Butte in finding him guilty of misconduct in office, and of the mayor of said city in discharging him permanently from his office of chief of police. From a judgment ordering dismissal of the proceedings, relator appeals.

Affirmed.

In behalf of Appellant, *Messrs. Kirk, Bourquin & Kirk*, and *Mr. W. E. Carroll*, submitted a brief. *Mr. Carroll* and *Mr. George M. Bourquin* argued the cause orally.

Certiorari is the proper remedy. "Where the power of a municipal body to remove from office is not discretionary, but only for cause, after notice and hearing, the proceedings are judicial in their nature and may be reviewed on *certiorari*. On such review the court will inspect the record to see whether the body had jurisdiction and kept within it, and whether the charges were sufficient in law; and will examine the evidence, not for the purpose of weighing it, but to ascertain whether it furnished any legal and substantial basis for the removal." (28 Cyc. 442, citing *Matter of Carter*, 141 Cal. 316, 74 Pac. 997; *Carter v. Durango*, 16 Colo. 534, 25 Am. St. Rep. 294, 27 Pac. 1057; *Board of Aldermen v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215, 22 Pac. 784; *State v. Duluth*, 33 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118; *People v. Nichols*, 79 N. Y. 582; *Hayden v. Memphis*, 100 Tenn. 582, 47 S. W. 182.) No intemperances can be indulged in as to the jurisdiction and regularity of the proceedings in such cases. (*State v. Lupton*, 64 Mo. 415, 27 Am. Rep. 253.) Whether the charges preferred are sufficient in law is a matter properly reviewable. (*State v. New Orleans*, 107 La. 632, 32 South. 22; *State v. Shakspeare*, 43 La. Ann. 92, 8 South. 893; *State v. Duluth*, *supra*; *State v. Hoglan*, 64 Ohio St. 532, 60 N. E. 627; *Ayers v. Hatch*, 175 Mass. 489, 56 N. E. 612; *People v. Brady*, 48 App. Div. 128, 62 N. Y. Supp. 603; *Riggins v. Waco*, 100 Tex. 32, 93 S. W. 426; *Hogan v. Collins*, 183 Mass. 43, 66 N. E. 429.)

The respondent mayor was a proper party defendant. Should there be any doubt as to the propriety of making the mayor a

respondent, we submit that the portion of the motion to quash based upon misjoinder of parties should not be allowed to prevail as the recourse in such case is to retain the writ as to the proper parties and quash as to the remainder. (*Champion v. Minnehaha County*, 5 Dak. 416, 41 N. W. 739; *State v. New Brunswick*, 42 N. J. L. 510.) Nor will the writ be quashed if directed to an unnecessary party. (*Hutchinson v. Rowan*, 57 N. J. L. 530, 31 Atl. 224.)

The misconduct in office contemplated by the Police Law relates to acts committed against the interests of the city, and must have immediate relation to his office, or be of so infamous a nature as to render him unfit to execute any public franchise. (1 Dillon on Municipal Corporations, sec. 251; *State v. Duluth, supra*; *Speed v. Council*, 98 Mich. 360, 39 Am. St. Rep. 555, 57 N. W. 406, 22 L. R. A. 843.)

While it is true that the statute vests the discretion in the mayor of determining the punishment for neglect of duty in failing to report to the mayor daily, it is hardly possible that the legislature intended that the extreme penalty should, under ordinary circumstances be visited upon a police officer for a mere technical violation of a rule which is not shown to have prejudiced any rights of the public or interfered with the proper discipline of the department. (*People v. Greene*, 89 App. Div. 296, 85 N. Y. Supp. 866.)

Upon our advancement that it stands admitted upon the motion to quash that the decision of the board was made through bias, was predetermined, partisan and unfair, we submit, as clearly outlining the proposition, the opinion of the court in *People v. Monroe*, 97 App. Div. 283, 89 N. Y. Supp. 929.

The motion to quash in this proceeding having but the effect of a demurrer under another name, we submit that the allegations as to bias, unfairness, predetermination and interested partisanship, so being admitted as true, ought as a matter of simple justice to have impelled the lower court to examine the facts offered to it and to have reviewed the decision of the board upon its merits, and if it found such to have existed, then to have granted relief.

Mr. Edwin M. Lamb, Mr. John R. Boarman, and Mr. N. A. Rotering submitted a brief in behalf of Respondents. *Mr. H. L. Maury* argued the cause orally.

We submit that every requirement of the law in the trial was complied with, and that the judgment of the district court was and is correct. The record shows that Mr. Wynne was intent upon performing some of the duties that properly belonged to the sheriff of Silver Bow county, that the sheriff objected, and that he collected fees without rendering any service whatever. That Wynne was guilty of moral turpitude in so doing there can be no question. "Moral turpitude is anything done contrary to justice, honesty, principle or good morals." (27 Cyc. 912; *Brackenridge v. State*, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.)

Appellant urges that the charges are insufficient, and that there is no sufficient evidence to support said charges. Under the adjudicated cases the charges and the evidence are sufficient. "Where the statute prohibits a removal except for cause but does not specify what shall constitute cause, the question is for the determination of those vested with the power of conducting the hearing." (28 Cyc. 445.) In an Illinois case the plaintiff in error, a civil service employee, had absented himself from duty without permission, for three days. The commission upon trial found him guilty and he was removed from the service, and such absence held sufficient cause. (*Kammann v. City of Chicago*, 222 Ill. 63, 78 N. E. 16.) Where it appears that the proceedings were fairly conducted and the evidence was sufficient to support the charges, the proceedings will not be reversed. (28 Cyc. 447; *People ex rel. Gilon v. Coler*, 78 App. Div. 248, 79 N. Y. Supp. 1085; see, also, *Ayers v. Hatch*, 175 Mass. 489, 56 N. E. 612.)

It is urged that misconduct in this case was not committed by Mr. Wynne against the interests of the city. It is immaterial against what interests he was acting. (*Joyce v. City of Chicago*, 216 Ill. 466, 75 N. E. 184.) Nor does it make any differ-

ence what his intentions may have been. (*State ex rel. Starkweather v. Common Council*, 89 Wis. 612, 64 N. W. 304.)

MR. JUSTICE SMITH delivered the opinion of the court.

On July 12, 1910, the above-named relator was chief of police of the city of Butte. On that day written charges were filed against him by the mayor, with the examining and trial board of the police department; a hearing was subsequently had and the board found him guilty of misconduct in office. The mayor thereupon discharged him permanently from the police department and from his office of chief of police. He subsequently sued out of the district court of Silver Bow county a writ of review, praying that the actions of the board and of the mayor be set aside and held for naught, whereupon the respondents moved to quash the same. The motion was granted and the proceedings were dismissed. From a judgment entered pursuant to the order of dismissal relator has appealed. Attached to his affidavit are the charges filed against him by the mayor, together with his answer thereto and the testimony taken at the hearing, so that the district court had before it, and we have before us, the whole record upon which the mayor and the board acted.

It is contended that the charges were not sufficient in law to constitute or be misconduct in office or any offense whatever. In the case of *Bailey v. Examining and Trial Board*, 42 Mont. 216, 112 Pac. 69, we said: "A charge without substance is no charge. One of the essential requirements of law is that a charge shall embody facts sufficient to constitute a cause of action within the meaning of the Act." The relator was charged with misconduct in his office of chief of police. It would serve no useful purpose at this time, nor is it necessary, to attempt to detail what may be comprehended in a charge of misconduct in office. Any [1] act involving moral turpitude, or any act which is contrary to justice, honesty, principle or good morals, if performed by virtue of office or by authority of office, is certainly included therein. The written accusation filed with the board sets forth in detail the alleged acts of relator from which the conclusion

was drawn that he was guilty of misconduct in office. The testimony substantially bears out the allegations of the charge, and we may therefore consider both together. As was said in the *Bailey Case, supra*: "Before the charge can be sustained some substantial evidence must be given in support of it."

It appears from the evidence of one Lavelle, who held the position of city jailer in Butte, that on or about the 10th or [2] 12th day of August, 1908, he was spending his vacation in the city of Great Falls, where he was attending an Elks' convention; he went there on a round trip ticket which he himself purchased. While in Great Falls, chief of police Pontet of that city told him that he had arrested two men named Gilbert and Colosmo, who were wanted in Butte for stealing a bicycle, and asked him if he would take them back when he returned. He assented and took them back to Butte, where they were placed in the city jail. He had no communication with the relator before returning to Butte, nor did he have a warrant of arrest; but the next day Wynne asked him what it had cost him to bring the men over and he replied, "Thirteen dollars." Wynne paid him this sum and no more. A warrant having been issued out of a justice of the peace court against Gilbert and Colosmo charging them with petit larceny, the relator made the following return thereto: "I hereby certify that I received the within warrant on the 15th day of August, 1908, and served the same by arresting the within named Gilbert and Colosmo and bringing them into court this 18th day of August, 1908. Fees serving warrant, mileage \$68.80; Great Falls, 688 miles. Total fees on warrant. E. W. Wynne, Chief of Police."

On August 18, 1908, the relator filed with the county auditor the following claim against the county:

"Silver Bow County to E. W. Wynne, Dr.

 "State of Montana v. Philip Gilbert, Joe Colosmo.

 "(Warrant) Mileage Great Falls..... 688 miles \$68.80

 "Officer Butte to Great Falls..... 172 miles.

 "Officer Great Falls to Butte..... 172 miles.

 "Two prisoners Great Falls to Butte..... 344 miles.

"State of Montana,
"County of Silver Bow,—ss.

"The undersigned, being duly sworn, says that the items mentioned in the foregoing account were furnished as therein stated, and that the amount therein claimed is just, due and wholly unpaid.

"E. W. WYNNE.

"Subscribed and sworn to before me this 18th day of August, 1908.

"GUS. J. STROMME,
"County Auditor.
"GEO. ROFF,
"Deputy County Auditor."

The following indorsements appear on the claim:

"To the Board of County Commissioners:

"Gentlemen: I have examined the within account and claim against Silver Bow county and find that the amount, \$68.80, appears to be correct as presented, unpaid and should be allowed.

"GUS. J. STROMME,
"County Auditor.

"The within account is allowed in the sum of \$—— on the general fund, October 15, 1908.

"JOHN G. HOLLAND,
"Chairman Board Co. Com."

On October 15, 1908, the relator received from the county treasurer the amount claimed by him, \$68.80. Mr. Brown, a member of the board of county commissioners, testified that the claim was not immediately allowed for the reason that the board was opposed to paying it, "thinking that that part of the work belonged to the sheriff." Mr. Holland, another commissioner, testified that the board was waiting to ascertain whether the sheriff would make a similar charge for the same service. He also testified that Chief Wynne appeared before the board and "claimed that he attended to the service and that he should be paid, that other chiefs of police were being paid for similar character of work." Mayor Corby, from whom Wynne received

his probationary and also his permanent appointment as chief of police, testified that he was advised by the chief that he claimed the right to go outside of the city to make arrests and would either go himself or send a man to do so; he asked Wynne if the city would be liable for the costs, and was told that the same would be a county charge; Wynne told him he expected to make charges against the county for such services, and, under the circumstances, he approved of his determination to do so, and afterward appointed him permanently to the office of chief of police. It does not appear, however, that Mayor Corby had any knowledge of this particular charge when he made the appointment.

On September 16, 1908, the county auditor transmitted to the county attorney a copy of Wynne's bill against the county with the inquiry: "Is the bill of E. W. Wynne a legal claim against Silver Bow county and should the same be paid?" The county attorney replied that service of the warrant by the chief of police was valid and that the ~~claim~~ should be paid. The county attorney himself testified that he regarded it as a legitimate claim against the county, but there is not anything in his testimony or in his letter to indicate that he had any knowledge that Wynne had not actually performed the services.

Mr. Henderson, the sheriff, testified that he was of opinion that the service of the warrant belonged exclusively to his office, and therefore protested against the payment of the claim, but having learned afterward that the "chief had as much right to collect the money as the sheriff had," he withdrew his objections.

The relator testified that the owner of the stolen bicycle made complaint of his loss and was told by him to go to the county attorney and get a warrant; he then traced the accused men to Great Falls and was notified by Chief Pontet that they had been arrested; prior to this time he had been told by chief of police Flannery, of Helena, that he was foolish not to claim the right to make such arrests, as he, Flannery, always did it. The county attorney gave him a warrant for the men. He continued: "I fully intended to go after the men but it so happened that Lavelle was over there. The message came that Lavelle was there

and was coming home the next day, and if I wanted him to, he would bring the prisoners here. I had the warrant in my possession and said all right, he could bring them. He brought them. The next day Lavelle told me what his expenses had been and I paid him. 'Now,' I says, 'this is something new in this office and I will put in a bill to the county commissioners; I don't know whether they will allow it or not; if they don't I am out this money that I have paid you. If they do allow it I will pay you your fare over there and back.' I put in the bill and they held it up; they didn't know what to do with it; I talked to the county auditor, explained the matter thoroughly to him; talked to the commissioners. They said they would get an opinion from the county attorney. Finally I went up there the last time; Commissioners Cronin and Holland were present, and I asked them to act on the bill. I says, 'Now, we brought these men back—I didn't do it myself; it so happened that an officer was there and brought them back, but we have done this work. I would like to have you act on this bill. If it isn't right, disallow it; if the amount isn't right, cut it down, but I would like to have you do something with it in order that I may know what to do in the future, if any of this work comes up.' They then had consulted with the county attorney, I believe, and they both said that there was no question but that I was entitled to that money and they allowed the bill. Lavelle never mentioned the matter to me again. He has never made any request for any portion of the money. If it had ever been mentioned in the least way, or brought to my memory, it would have been paid. He knew absolutely that I was going to put in a bill because I told him so. I paid him the thirteen dollars from my own funds and the city of Butte never repaid me any portion of it. I worked in the auditor's office for two or three years and know positively that all bills were put in in the sheriff's name, no matter who served the warrant or did the work. The bills were paid in the sheriff's name and he received the entire amount. I presume actual expenses were allowed to the deputies in such case. I simply followed the custom, explained it thoroughly to the county commissioners so that there would be no mistake.

about it. They then made no objection to the amount of the bill. They said if they didn't pay it to me they would have to pay it to the sheriff, and it didn't make any difference to them who it was paid to, so long as the work was done. I saw Mr. Lavelle almost daily while I was in the office. He never even asked me if the bill had been allowed. When I got this \$68.80 I presume it refreshed my memory that he was entitled to something. I didn't happen to think of that when I saw him. I didn't offer him any of the money. All I expected to give him would be his fare over there and back; he was entitled to that and I intended to pay him and if he brought it up when I saw him I would have paid him."

County Commissioner Brown testified that he had no knowledge that Wynne did not go to Great Falls, until after the claim had been allowed. Lavelle denied that Wynne told him that if the claim was allowed his railroad fare would be paid both ways, and he also testified that he and Wynne did not discuss the matter of filing a claim against the county.

It will be seen from the foregoing that the question presented to Mayor Corby, and to the county attorney, the county commissioners and the auditor, was whether the chief of police of Butte could lawfully serve a warrant outside of Silver Bow county. Those officers correctly determined that he could do so. (*State ex rel. Quintin v. Edwards*, 38 Mont. 250, 99 Pac. 940.) And of course, if he could lawfully serve the warrant, he could claim legal fees for such service. But the broader, general question whether an officer may claim fees for a service which he has not actually performed, basing his claim upon the fact that he has achieved the same result that would have been accomplished had he performed the service, seems not to have been presented to them for determination. The relator had no greater right to charge statutory mileage for himself than he would have had had he induced the accused persons to go from Great Falls to Butte unaccompanied by an officer. The case involves the consideration of a question to which the people of the country are at present giving considerable thought and attention.

It is contended for the relator that he acted in entire good faith, that he thought he had a legal right to charge mileage [3] to the same extent as would have been the case had he actually traveled from Butte to Great Falls and return. But he cannot be heard to make such claim. Mr. Justice Hunt, speaking for this court in the case of *Leggatt v. Prideaux*, 16 Mont. 205, 50 Am. St. Rep. 498, 40 Pac. 377, said: "That the justice of the peace believed he had a legal right to charge the fees he did, and acted in good faith in taxing and collecting the fees, constitute no defense. It would be most dangerous to the welfare of society if an officer elected to administer the law could violate it to his own pecuniary advantage, and escape the consequences of his act by pleading ignorance of the statute he had violated. That ignorance of the law is no excuse is a postulate of law, but, unless the maxim is upheld, there would be innumerable problems presented to courts, and he who knew the least might fare the best; or, as is said by the supreme court of California in *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45, 'the denser the ignorance the greater would be the exemption from liability.' * * * The receiving of the illegal fees is the gist of the wrong under the statute, and, when such fees are deliberately accepted, the law is violated." This relator had no right to claim mileage for an officer. The statute is plain. There are no perquisites, as such, attached to the performance of official duty in Montana. Our laws contemplate that officers shall be paid for actual service. The statute expressly declares that a sheriff, constable or other peace officer, traveling in the discharge of his duties, shall charge only for each mile *actually and necessarily* traveled. (Rev. Codes, sec. 3137.) The relator gains nothing by reason of the fact that other officers may have made similar charges. That system may be in vogue, but, if such be the case, the system is vicious and wrong. No officer has any right to charge the people for a service which he has not actually performed.

Nothing is gained for the relator by a consideration of the fact that the officers of Silver Bow county paid his claim, or

that the mayor made his appointment permanent after this particular charge had been made. Assuming that they had full knowledge of the facts, which the record, instead of disclosing, tends rather to negative, their acquiescence in the carrying forward of such a system cannot possibly make it right. The system is fundamentally wrong, and no measure of participation therein by others can change the fact. It is unfortunate, perhaps, for the relator, that he is the first to suffer from an overturning of the system, but courts cannot be influenced by such considerations. The sole question for us to determine is, whether there was produced before the examining and trial board any substantial evidence in support of the charge that the relator was guilty of misconduct in his office of chief of police. We hold that there was.

It is alleged in the affidavit of relator that "the respondents did not act in good faith in the presentation and trial of said [4] charges, but they were at all times actuated by partisan political motives in a united effort to oust all appointees made under the administration of Mayor Corby, and particularly to oust this relator and to install as members of the police department the partisans, friends and political co-workers of the respondents." It is then set forth that two of the members of the examining and trial board were Democrats and the third "claimed to be a Republican"; that one of the Democratic members had stated that he did not "believe in the Metropolitan Police Law," and the other had said he believed that "everything was fair in politics if necessary to gain party success." It is further alleged that the respondent mayor, Nevin, "has endeavored by any and every means in his power to set aside the plain provisions of the said Metropolitan Police Law," and that in furtherance of such endeavors he had, immediately on coming into office, filed charges against certain of Mayor Corby's appointees, and had suspended and discharged others. It is claimed that by filing the motion to quash, the respondents have admitted these allegations to be true. Be that as it may, we think they are immaterial in this particular case. The relator's

own testimony fails to justify the particular act with which he is charged, and we are of opinion that the determination of the board was correct, regardless of the motives which actuated it.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. GEIGER, RELATOR, v. LONG, RESPONDENT.

(No. 2,992.)

(Submitted April 3, 1911. Decided April 22, 1911.)

[117 Pac. 104.]

County Seats—Fixing Permanent Location—Special Laws—New Counties—Power of Legislature—Lincoln County Act—Constitutionality.

New Counties—County Seats—Legislature—Implied Powers.

1. The legislature having the power to create new counties by special Act (*Holiday v. Sweet Grass County*, 19 Mont. 364, 48 Pac. 553), authority to do all things incidental to a complete exercise of such power is implied.

Same—County Seats—Permanent Location—Modee Permissible.

2. One of the powers necessarily incidental to the complete creation of a new county is that of designating a county seat, which power may be exercised by locating a permanent county seat in the Act creating the county, or by naming a temporary or provisional place and leaving the question of the permanent location of the seat of government to the people of the county for decision. (See opinion on rehearing, *post*, p. 415.

Same—“Changing” and “Removing” County Seats.

3. The words “changing” and “removing” found in the Constitution and the statute laws having to do with county seats, refer to the act of changing or removing a county seat which has been definitely located, and not to a temporary or provisional one.

Lincoln County—Permanent County Seat—Location—Constitutionality of Act.

4. Held, that that portion of the Act creating Lincoln county (Laws of 1909, Chapter 133) providing, after designating the town of Libby as the county seat, that the people of said county should definitely fix the county seat by means of an election, was not unconstitutional as conflicting with the provision of section 26, Article V, of the Constitution, that “the legislative assembly shall not pass local or special laws * * * locating or changing county seats.” (For holding *contra*, see opinion on rehearing, *post*, p. 415.)

Original application for *mandamus* by the state, on the relation of John H. Geiger, against Philip R. Long, as clerk of the district court of Lincoln county. Demurrer and motion to quash sustained, and proceedings dismissed.

Mr. Wm. T. Pigott, Messrs. Wight & Pew, Mr. G. H. Grubb, and *Mr. Sidney Logan* submitted a brief in behalf of Relator. *Messrs. Wight, Pew and Grubb* argued the cause orally.

An ancient and universally approved maxim is that contemporaneous interpretation, or construction, or exposition of constitutions or statutes, whether by the court or by the framers of the Constitution, or by the law-making power, or by the officers charged with the execution of that instrument, of any enactments which are based thereon, or by the silent, but none the less effective, tacit consent and approval of the people, is the best and strongest evidence and proof of what the provisions, constitutional or statutory, were intended to mean. (*The Laura*, 114 U. S. 411, 414, 416, 5 Sup. Ct. 881, 29 L. Ed. 147.) So in the proceeding at bar, the practical interpretation by the framers of the Constitution, by the legislative assembly, by governors, by executive and ministerial officers, by judges, and by all the people, for nearly a quarter of a century, coupled with the fact that this interpretation was made by many of the same men who were members of the constitutional convention, and sat in subsequent legislatures, makes an end of respondent's contention; and is likewise in perfect harmony with the decision of this court in *Holliday v. Sweet Grass Co.*, 19 Mont. 367, 48 Pac. 553; *Sackett v. Thomas*, 25 Mont. 226, 64 Pac. 503; *State v. Mayhew*, 21 Mont. 93, 52 Pac. 981; see, also, *Doan v. Logan Co.*, 2 Idaho, 781, 26 Pac. 167, and *Attorney General v. Iron Co.*, 64 Mich. 607, 31 N. W. 539; *Territory v. County of Mohave*, 2 Ariz. 248, 12 Pac. 730.

Respondent insists that the legislative assembly has power, in creating a county, to designate the temporary or provisional county seat, but that it is beyond its competency in the same Act of creation, to make provision whereby the people may, at the next general election, themselves express their preference

for the place at and from which their own local affairs shall be carried on and administered. He seems to contend that the legislative assembly exhausts its power when it names the temporary county seat, and that it can never thereafter permit the removal of the seat of government to another place, until and unless there be a general law, applicable to all the counties of the state, authorizing the people to make such change at an election, which would, according to his own contention, be the location by the legislative assembly of a county seat by a special Act, this result being brought about by the inaction of the legislature to pass any general law, under which this temporary—provisional—permanently fixed county seat can be "located"; in other words, that the county seat selected by the legislative assembly as the temporary or provisional county seat cannot be changed by pursuing *any* provision which *can* be incorporated into the Act of the creation, but that such temporary county seat becomes at once the permanent county seat. The county seat cannot be temporary and provisional, and, at the same moment of time, permanent and lasting. It might as well be said of a judge *pro tempore* that he is not only a *locum tenens*, but the regular and permanent judge, or of an officer that he is such *de facto* and *de jure*. We venture respectfully to suggest that an officer cannot be, at one and the same time, provisional and permanent, and that a county seat cannot be, at one and the same time, temporary and provisional, and fixed and permanent. This would be a contradiction, not only in terms, in form, and in language, but in actuality.

There is no provision of the Constitution prohibiting the legislature from creating counties of the state, and by section 1 of Article XVI it has the power by express grant. There being no such constitutional prohibition, the rule is universal that the legislature has that power. If the power to create a county is present in the legislature, there must inevitably and logically follow the power to do everything that may be necessary or proper to be done in the full and complete creation of the county, so that the creation itself—the county—may be a complete entity, with nothing lacking, and ready to take its place amongst

the counties of the state, as a completed whole, a political, governmental, subdivision of the state. All the counties must have county seats—a place to hold court, a place for officers to perform the county's business—and if this thing is lacking, it is not a completed whole. (See *Holliday v. Sweet Grass County*, 19 Mont. 364, 48 Pac. 553.)

While the legislature itself might have provided that the county seat of Lincoln county should be at the town of Libby temporarily, and at the town of Eureka permanently, yet it had the power to delegate the determination of the establishment of the county seat to the qualified electors of the county. The courts have universally held that, where the legislature had power to do an act itself, that power might be delegated to the people. (*State v. Commissioners*, 24 Fla. 263, 4 South. 796; *Upham v. Sutter Co.*, 8 Cal. 383.)

The constitutional prohibition against the locating or changing of county seats by local or special laws was intended to apply only to counties after they had been fully created. (See *Doan v. Commissioners*, 2 Idaho, 781, 26 Pac. 167; *Attorney General v. Iron County*, 64 Mich. 607, 31 S. W. 539; *People v. Glenn*, 100 Cal. 419, 38 Am. St. Rep. 305, 35 Pac. 302; *People v. County of Orange*, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851.)

Messrs. Gunn & Hall, and *Mr. John W. Stanton*, for Respondent, submitted a brief in support of demurrer and motion to quash. *Mr. M. S. Gunn* argued the cause orally.

It is our contention that the provisions of section 3 of the Act in question, to the extent that they provide for holding an election to determine the location of the permanent county seat of Lincoln county, are in violation of section 26, of Article V, of the Constitution of Montana. That this law is both local and special, and has for its purpose the location of the county seat of Lincoln county, is a proposition which does not admit of controversy. (*Sackett v. Thomas*, 25 Mont. 226, 64 Pac. 503.) Many of the states have constitutional provisions prohibiting special and local laws changing or locating county seats, and in every instance where the question of the constitutionality of a

law providing for an election to determine the location of a county seat in a particular county has been presented in states having such constitutional provisions, it has been held that such a law is invalid. (See *Groves v. County Court*, 42 W. Va. 587, 26 S. E. 460; *Presidio County v. Jeff Davis County* (Tex. Civ. App.), 77 S. W. 278; *Ex parte Connolly*, 17 N. D. 546, 117 N. W. 946; *Adams v. Smith*, 6 Dak. 94, 50 N. W. 720; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800.)

The Constitution does not prohibit the creation of a county by special Act. (*State v. Mayhew*, 21 Mont. 93, 52 Pac. 981.) It is undoubtedly within the power of the legislative assembly, in providing for the creation and organization of a county, to designate a place as the temporary county seat. (*Holliday v. Sweet Grass County*, 19 Mont. 364, 48 Pac. 553; *Sackett v. Thomas*, *supra*; 11 Cyc. 367; *Rice v. Shay*, 43 Mich. 380, 5 N. W. 435; *Attorney General v. Board of County Canvassers*, 64 Mich. 607, 31 N. W. 539.) Notwithstanding the provision of section 26, Article V of the Constitution, that the legislative assembly shall not pass local or special laws creating county offices, etc., it clearly has the power, as incidental to the creation of a new county, to designate the county officers. This power is "necessarily incidental to the creation of a new county." For the same reason a temporary county seat may be designated. Section 6 of Article XIX provides that all county officers shall keep their offices at the county seats of their respective counties. This provision clearly contemplates that the legislative assembly, in the exercise of its power to create a new county and provide for its organization, shall designate a temporary county seat. A temporary seat is as essential to the organization of a new county and the operation of the governmental machinery therein, as the designation of county officers. It is essential to the validity of a judgment that the court rendering the same should be held at the time and place designated by law. (Black on Judgments, sec. 177.) It follows that the designation of a temporary county seat is absolutely essential to the creation and organization of a county.

On the argument relator cited the case of *Doan v. Board of County Commissioners*, 2 Idaho, 781, 26 Pac. 167, and the case of *Attorney General v. Board of County Canvassers*, 64 Mich. 607, 31 N. W. 539, in support of the contention that, the law in question is constitutional. It is true that in each of those cases the courts sustained the validity of a special and local law providing for an election to determine the location of a permanent county seat. In neither of the states, however, is there a constitutional provision prohibiting the passage of local and special laws locating or changing county seats, but in each of these states there is a constitutional provision similar to section 2 of Article XVI of our Constitution, providing that the law-making body shall not have the power to remove a county seat, but may provide for such removal by general law. It was held and decided in those cases that until a county seat has been permanently located, the provision of the Constitution with reference to removal has no application. The court said that the permanent location of a county seat at a different place from that designated in the law creating the county as the temporary seat is not a removal within the meaning of the constitutional provision. To the same effect is the case of *County Commissioners v. State*, 27 Fla. 263, 4 South. 795. The cases of *Doan v. Commissioners* and *Attorney General v. Board of County Canvassers* are authorities to the effect that the designation of a temporary county seat is not the establishment or location of a county seat, and that section 2 of Article XVI of the Constitution of Montana, which provides that "the legislative assembly shall have no power to remove the county seat, but the same shall be provided for by general law," is only operative after a county seat has been permanently located.

In view of the fact that section 2 of Article XVI of the Constitution prohibits the removal of a county seat by special law, section 26 of Article V, prohibiting local or special laws "locating or changing county seats," cannot apply to a county seat which has been permanently located, and can only apply to new counties where the county seat has not been permanently located.

The following states have constitutional provisions prohibiting local and special legislation "locating or changing county seats": Illinois, Article IV, section 22; Missouri, Article IV, section 53; Wisconsin, Article IV, section 31; North Dakota, Article II, section 69; Wyoming, Article III, section 56; South Dakota, Article III, section 23; Nebraska, Article III, section 15; Colorado, Article V, section 25. All of the above states have general laws providing for the location of county seats.

MR. JUSTICE SMITH delivered the opinion of the court.

By an Act entitled "An Act to create the county of Lincoln, designate its boundaries and provide for its organization and government," being Chapter 133 of the Laws of 1909, the legislative assembly erected a certain portion of Flathead county into the county of Lincoln. Section 3 of the Act reads as follows:

"That the town of Libby, situate within the boundaries above mentioned, shall be the county seat of said county of Lincoln, until the county seat of said county shall be designated as hereinafter provided. And for the purpose of definitely fixing and creating the county seat of the county hereby created, the board of county commissioners of Lincoln county shall cause to be inserted in the official ballots, when printed for the general election held the first Tuesday after the first Monday in November A. D. 1910, at the foot of the names of the candidates, or nominees thereon, the following: 'For the county seat of Lincoln county _____,' and the electors, when voting at the said general election at the time hereinbefore mentioned shall declare their vote upon said proposition by inserting in the blank space upon their ballots herein provided for, the name of some one town within said county of Lincoln, and when the name of a town shall be so inserted in the space by an elector, and the ballots have been cast as provided by law, the name shall be deemed a vote for the designated town as the place of the permanent county seat of Lincoln county, and upon a canvass of the said ballots the town having the highest number of ballots shall be declared by the canvassing board the county seat of Lincoln

county, which result shall be entered in the office of the county clerk and recorder of said Lincoln county, and from the date of such declaration of result, the town selected shall be and remain, until lawfully changed, the county seat of Lincoln county. All laws of a general nature applicable to the several counties of the state of Montana, and the officers thereof, shall be made applicable to said county of Lincoln, and the officers who may hereafter be elected, or appointed, therein, except as otherwise provided in this Act."

At the general election held in November, 1910, the town of Eureka received 653 votes for the county seat, and the town of Libby received 638 votes; and thereupon the board of county commissioners, sitting as a board of canvassers, found and declared that the town of Eureka was the permanent county seat of Lincoln county. The respondent, who is the clerk of the district court of the county, refused to remove his office from Libby to Eureka and this proceeding in *mandamus* was instituted to compel him to do so. He has filed a motion to quash an alternative writ heretofore issued, and also a general demurrer to relator's affidavit for the writ, and the matter has been submitted for final decision.

It is contended that that portion of the Act providing for an election to determine the location of the permanent county seat is unconstitutional, for the reason that it conflicts in its provisions with section 26 of Article V of the Constitution. That section, in so far as it is invoked, reads thus: "The legislative assembly shall not pass local or special laws * * * locating or changing county seats." It is said that that portion of the Act providing for an election is both local and special in its provisions, and we could readily agree with the conclusion, if the provisions referred to related to a county seat already located or to a county fully created. As will hereafter be shown, however, being a part of the Act creating the county, they cannot be regarded as local or special within the meaning of those terms as employed in the Constitution, if it be admitted that the legislative assembly has the power to create a county by special Act. In the case of *Holliday v. Sweet Grass County*, 19 Mont. 364,

48 Pac. 553, this court, through Mr. Justice Buck, said: "Creating a new county by a special Act is not forbidden by the state Constitution, and matters necessarily incidental to the creation of a new county, which are provided for in the Act creating it, solely for the purpose of organizing the new county and setting it in motion as one of the governmental subdivisions of the state, do not come within either the letter or the spirit of the inhibitions of section 26, Article V, of the Constitution." In the case of *State ex rel. Sackett v. Thomas*, 25 Mont. 226, 64 Pac. 503, this court again recognized the power of the legislative assembly to create a county by special Act, in the following language: "The Constitution recognizes the power of the legislature to create new counties, to change those already established, and to alter their boundaries, * * * and this power has been heretofore exercised in many instances. It has been recognized and affirmed by this court, in *Holliday v. Sweet Grass County*, where a special Act creating the defendant county was upheld; and this power to create necessarily implies the power to destroy, so that, in the exercise of it, the legislature may abolish a county organization, and incorporate its territory within another county. It may also at the same time exercise any other power incidental to a complete exercise of the principal one; but this power does not necessarily carry with it the right to interfere by special enactment in the internal affairs of the county, even though a majority of the people do not object. The whole spirit of the Constitution is opposed to this species of interference, and it seems clear to us that the prohibition in question was designed to prevent just such interference as has been attempted in the present instance [changing the name of a county already created]. The power to create counties and give them names, or to destroy them, is unquestioned; but after they are created they may not be disturbed by special or local legislation, except incidentally, in the exercise of the creative power, or in cases where a general law cannot be made applicable." (See, also, *State ex rel. Williams v. Mayhew*, 21 Mont. 93, 52 Pac. 981.)

It will be noted that the assertion in *Sackett v. Thomas*, to the effect that the legislature has the undoubted right to create new

counties by special Act, is based upon the former decision in *Holliday v. Sweet Grass County*. In that case the opinion does not disclose any examination of constitutional provisions or a citation of authorities. The decision, however, is not without authority to uphold it. It might perhaps have been urged that the legislature has no authority to create a new county by special [1] Act, for the reason that it has no power to locate a county seat, a necessary institution in every county. Nevertheless, it is settled law in this state that the legislature has such power, and that holding ought not to be changed at this time. Until the last session of the legislative assembly (1911), we had no general law providing for the creation of new counties, but notwithstanding this, the legislature has created, since the adoption of the Constitution, the following counties, *viz.*: Flathead, Valley, Teton, Ravalli, Granite, Carbon, Sweet Grass, Broadwater, Powell, Rosebud, Sanders, Lincoln and Musselshell. If we should now hold that the legislature was without power or authority to create these counties, the result would be most disastrous. The legislature has, then, such power. And the possession of this power necessarily implies authority to "exercise every other power incidental to a complete exercise of the principal one." (*State ex rel. Sackett v. Thomas, supra.*) One of the necessarily [2] incidental powers is that of designating a place for the transaction of the business of the county, and this power may be exercised by locating a permanent county seat in the Act creating the county, or by naming a temporary or provisional place for the transaction of business and leaving the question of the permanent location of the county seat to the people of the county for decision. In either case the act of creation is not complete until the county seat is definitely and permanently located. In *State ex rel. Williams v. Mayhew, supra*, the question was raised as to the power of the legislature to appoint commissioners for Ravalli county. This court, among other things, said: "We raise no question that, as a general proposition relating to counties in existence, the legislative assembly has no power to elect or appoint county officers by an Act or otherwise. To so hold would be to ignore and do violence to the theory of local self-

government, which is conceded to be the fundamental principle—the corner-stone—supporting our whole system of government.

* * * Did the legislative assembly have the power to appoint or name provisionally the county officers of the county, including county commissioners, in and by the Act creating Ravalli county? It is and must be conceded that the legislative assembly has the power to create new counties. * * * But what is meant by creating a county by the legislative assembly? It means more than forming and defining it geographically. * * * It certainly seems that something more than laying out the boundaries and naming the offices is necessary to be done before it can be truthfully said that a county has been created. Such a creature would be a lifeless and useless thing, until inspired with motion and power and means to act in fulfilling the purpose of its creation. When it is said that a county has been created, it is, and ought certainly to be, understood that a municipality has been organized, with power and means to aid the state in administering its political affairs, and promoting the welfare of the people and best interests of the commonwealth. A county cannot be said to be created by the sovereign power, until it is endowed with power and means to aid in these important matters of the state."

The courts have met with no little difficulty in dealing with questions kindred to that which we are considering. While recognizing the principle of local self-government, some courts have placed their decisions on the ground that in creating a municipal subdivision of the state, an emergency arises which must be met by the legislature in order to fully exercise its undoubted sovereign power of creation. They have therefore designated county officers first appointed as temporary or provisional officers, as distinguished from permanent officers, who may only be selected by the people themselves. But it is simply begging the question to say that, the legislature has power to name "temporary" officers, but no power to name "permanent" officers. In our judgment, however, the particular designation is immaterial. The fact remains that a so-called temporary officer can hold until the next general election, and while he is in office his status is in no way distinguishable from that of an

elected officer. Such officers are, in fact, permanent (although the expression is paradoxical) until the next general election. After an officer of a new county, named by the legislature, has qualified, he is as firmly fixed in his office as he would be had he been elected, so that, however we may quibble about terms, an officer appointed by the legislature is as nearly permanent in his position as are public officers generally. In his case, however, the Constitution and general election laws intervene and provide for the selection of his successor. Not so with the so-called temporary county seat.

The last legislative assembly passed a general law (House Bill No. 12, approved March 9, 1911) providing "for the designation of temporary county seats and for the location of permanent county seats in new counties or in counties in which the permanent county seat has not been located." Prior to the passage of this measure, there was no general law by which a so-called temporary county seat could be located, changed, or removed. Consequently, if the legislature had exhausted its power in naming one place, even though it was designated as only temporary, it became in fact permanent. While it is argued by respondent's counsel that the act of fixing a county seat at a permanent place (the legislature having designated a temporary place) amounts to "changing" or "removing" the county seat, we are not able to agree with the suggestion. The words [3] "changing" and "removing" found in the Constitution and the statute laws refer to the act of changing or removing a county seat that has been definitely located, and have no reference to a so-called temporary or provisional county seat. (*Doan v. Board of Commissioners*, 2 Idaho, 781, 26 Pac. 167; *Attorney General v. Board*, 64 Mich. 607, 31 N. W. 539; *County Commissioners v. State*, 24 Fla. 263, 4 South. 795.) There is but one logical conclusion from this argument, and that is that a county is not fully created until its county seat has been definitely fixed and located. The legislative authority to create has not been exhausted, and, in fact, has not been exercised, until such time as a county seat shall be definitely located, either by the Act itself, or by operation of the machinery provided in

the Act. The legislative assembly of 1909 did not locate the county seat of Lincoln county, but did provide that the people of that county should select and locate their own county seat. This it had authority to do. (*Territory v. Board of Supervisors*, 2 Ariz. 248, 12 Pac. 730; *Rice v. Shay*, 43 Mich. 380, 5 N. W. 435; *Upham v. Supervisors*, 8 Cal. 379.) The result is that the [4] constitutional scheme of local self-government has not been violated, the people of Lincoln county have selected their own county seat, and the county is now fully created and established as one of the governmental subdivisions of the state.

The motion to quash the alternative writ is denied, the general demurrer to the relator's affidavit is overruled, and it is ordered that a peremptory writ of mandate issue, commanding the respondent to remove his office to the town of Eureka, and there maintain the same.

Writ granted.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY: I concur in the result reached by MR. JUSTICE SMITH, but again I am forced to acquiesce in a doctrine to which I do not subscribe, solely upon the ground of *stare decisis*.

Since our Constitution was adopted, thirteen new counties have been created, every one by a special Act of the legislature; property rights to the extent of millions of dollars have been acquired; and to reverse the former decisions of this court and hold at this late day that every such Act is unconstitutional and void would result in such chaos that it ought not to be done under the circumstances presented by this record, and under the conditions which now prevail.

In *Holliday v. Sweet Grass County*, mentioned above, this court, without any apparent consideration of the question—which does not appear to have been urged—and without the citation of any authority or the advancement of any argument, said: "Creating a new county by a special Act is not forbidden by the state Constitution." The authority of that decision was recognized in *State ex rel. Sackett v. Thomas*. I believe that the

ipse dixit in the *Holliday Case* is erroneous. That the framers of our Constitution intended that counties should be created, their boundaries changed, and county seats located, changed, and removed only by general laws of uniform operation, is, to my mind, quite plain. To speak of a county without a county seat would be a contradiction of terms. Every county must have a county seat. (Article XIX, sec. 6, Montana Constitution.) Whenever, then, a county is created, it has a county seat—not a provisional county seat, not a temporary county seat—but a county seat for every purpose. A provisional county seat is the purest creation of the imagination. Our Constitution speaks only of a county seat, and, if prior to the last election Libby was the county seat of Lincoln county, it was as much a county seat as Helena, Butte, or any other seat of county government; and when it was designated as the county seat in the Act creating Lincoln County, the county seat of that new county was in fact located. The county could not have been created without the location of the county seat at some designated place. And because the Constitution forbids the location of a county seat by a special Act of legislation, it impliedly forbids the creation of a new county by that species of legislation. The twelfth legislative assembly, recognizing this spirit and purpose of our Constitution, passed a general law for the creation of new counties and another general law for the location of county seats. By creating a phantom, and designating it a "provisional county seat," this court was able to draw a marked distinction between such creation and a county seat; but the creation is a fiction, the distinction unwarranted, and the effect of such decisions is to ignore a plain provision of the Constitution.

ON REHEARING.

(Submitted June 12, 1911. Decided July 1, 1911.)

Lincoln County Act—County Seat—Permanent Location—Special Laws—Constitution—Statutory Construction—Intent of Legislature—Part of Statute.

Lincoln County—Permanent Location of County Seat—Special Law—Unconstitutionality.

1. *Held*, under section 26, Article V, of the Constitution, that the legislature may not, in a special Act, creating a county, refer the location of its permanent county seat to a vote of the people of the county, but can do so only by a general law of uniform operation throughout the state; and that, therefore, that portion of the Act creating Lincoln County (Laws of 1909, Chapter 133, sec. 2), making it incumbent upon the county commissioners to submit the permanent location of the county seat to a vote of the electors, offends against the special and local law clause of the Constitution, *supra*, and is void.

Mr. JUSTICE SMITH dissenting.

Interpretation of Statutes—Intent of Legislature—Part of Statute.

2. In the interpretation of a statute the courts must look to the statute itself, its history, or both, for the key to the legislative intent, a thing within the intention of its makers being as much within the statute as if within the letter.

Constitution—Special Laws—Prohibition Absolute.

3. The prohibition against local or special laws, in section 26, Article V, of the Constitution, is absolute.

Same—Special Laws—What not Excuse for Enactment.

4. Failure on the part of the legislature to pass a general law on a given subject does not justify the enactment of a special one which is prohibited.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The facts are stated fully in the opinion heretofore filed and need not be repeated. Further consideration of the question involved leads us to the conclusion that the effect of our former decision is to nullify a plain provision of our state Constitution.

It will not do to say that the inhibition in section 26, Article V, is aimed only at Acts which seek to locate county seats after they have been once located. A county seat once permanently located cannot be located again. It may be changed or removed, but the removal is covered by another provision of the Constitution. "Locate" and "remove" do not mean the same thing, and when both terms are employed in the Constitution they must be given effect. If the legislature may by special Act

create a county and name the permanent county seat, then the prohibition in section 26, Article V, is meaningless. That the Act under consideration is a local and special law can scarcely be controverted. It falls squarely within the definitions of local and special laws given by the authorities generally. (See authorities cited in 36 Cyc. 986, and 26 Am. & Eng. Ency. of Law, 2d ed., 532.) In *State ex rel. Sackett v. Thomas*, 25 Mont. 226, 64 Pac. 503, this court refers to the Act creating Sweet Grass county as a special Act; while counsel for relator in the original brief filed by them in this case say that the Act creating Park county was a local and special law. If those Acts were local and special, so is the one now under consideration, for the three Acts are practically identical in their provisions.

But it has been urged upon us most earnestly that, since the Act under consideration does not designate a permanent county seat in terms, but only provides the means by which such permanent county seat is to be located, it is not within the meaning of the prohibition contained in section 26, Article V. A review of the history of Montana will aid materially in ascertaining the meaning to be given to the provision of the Constitution here involved.

Both parties to the controversy concede that the legislature may by special Act create a county and name a provisional county seat. Whether that conclusion is right or wrong is not involved here; but, for the purposes of this case, we must assume that such authority is not denied to the legislature, and upon that assumption, determine the only question involved, *viz.*: May the legislature refer the location of a permanent county seat to a vote of the people of the county *by a special Act*, or can it be done *only* by a general law of uniform operation throughout the state?

The legislative history of Montana is divided into three distinct periods, *viz.*: (1) From the organization of the territory in 1864, to July 30, 1886; (2) from July 30, 1886, to the admission of the state, in November, 1889; and (3) from the date of admission to the present time.

1. *Under the Organic Act.* During this first period, it may be said that there were not any limitations placed upon the legislative power of the territory in dealing with questions of the territory's internal affairs. The first legislative assembly convened at Bannock, in 1864, and passed an Act creating nine counties, *viz.*, Beaverhead, Big Horn, Chouteau, Deer Lodge, Edgerton, Gallatin, Jefferson, Madison, and Missoula, defining the boundaries of each and naming for each, except Big Horn, a provisional county seat. The Act contains a provision by which the voters of the several counties might at the next election determine the location of their respective county seats. (Bannock Statutes, p. 528.) By a special Act, approved November 16, 1867, Meagher county was created, and Diamond City designated the county seat "until the next general election." Provision was then made for submitting to the electors the question of definitely locating the county seat. (Laws 1867, p. 99.) Dawson county was created in 1869. The Act provides: "The county seat of said Dawson county is hereby located at Fort Peck." (Laws 1868-69, p. 102.) In 1877 the name of Big Horn county was changed to Custer. (Laws 1877, p. 425.) And in 1879 the county seat of Custer county was by special Act definitely located at Miles. (Laws 1879, p. 100.) Silver Bow county was created in 1881, and Butte made the permanent county seat. (Laws 1881, p. 85.) Yellowstone county was created in 1883, and Billings made the county seat. (Laws 1883, p. 119.) Fergus county was created in 1885 by a special Act which made Lewistown the county seat. (Laws 1885, p. 78.)

In the meantime the county seat of Edgerton county was changed by special Act from Silver City to Helena (Laws 1867, p. 101); and on December 20 of the same year, and by another special Act, the name of Edgerton county was changed to Lewis and Clark. (Laws 1867, p. 130.) At the same session the county seat of Missoula county was changed by special Act from Hell Gate to Missoula Mills. (Laws 1867, p. 107.) At the same session the county seat of Deer Lodge county was changed from Silver Bow to Deer Lodge. (Laws 1867, p. 102.)

By special Act a public road was established from Bozeman to Helena. (Laws 1867, p. 84.) In 1869 the county commissioners of Madison county were authorized to subscribe \$15,000 of the public funds to purchase capital stock of the "Capital Ditch Company," a private corporation. (Laws 1869-70, p. 59.) In 1867, Robert Tingley and John Kennedy were granted an exclusive privilege to lay out and maintain a road around the Great Falls of the Missouri river. (Laws 1867, p. 109.) The fourth territorial legislative assembly passed a number of similar special Acts, of which the following is one: "That the bonds of matrimony existing between Henry B. Steel and Roena A. Steel, his wife, be and the same are hereby dissolved." (Laws 1867, pp. 130-133.) By an Act of the sixth legislative assembly, it is provided: "That Sarah Francis Gorham, an infant of the age of sixteen, a citizen of Montana, be and she is hereby declared of lawful age." (Laws 1869-70, p. 104.) In 1879 the territorial legislature passed an Act "that the name of Sing On, of the county of Lewis and Clark, in the territory of Montana, be and the same is hereby changed to George Taylor." (Laws 1879, p. 116.)

These are only a few of the special laws enacted in the early days of our territorial existence; but it will be observed that the legislature, having been left free to enact special laws, exercised its authority freely and upon a great variety of subjects. At the close of this first period, however, the Congress of the United States passed an Act entitled "An Act to prohibit the passage of local or special laws in the territories of the United States, to limit territorial indebtedness, and for other purposes." (Approved July 30, 1886.) The Act prohibits territorial legislatures from passing local or special laws upon any of twenty-four enumerated classes of subjects, among which are: For granting divorces, changing the names of persons or places, laying out roads or highways, and locating or changing county seats. (Act July 30, 1886, c. 818, 24 Stat. 170; Comp. Stats. 1887, p. 31.)

2. *Under the Organic Act as Modified by the Act of July 30, 1886.* During this period but two counties were created. The Act creating Park county, approved February 23, 1887, pro-

vides that "the village of Livingston * * * shall be the county seat of said Park county until some other place * * * shall be designated as provided by law," followed by a provision for the location of the permanent county seat by a vote of the people. (Comp. Stats. 1887, p. 1238.) The Act creating Cascade county designates Great Falls as the county seat, followed by language similar to that above, except that no provision is made for the location of the permanent county seat. (Laws 1887 (Fifteenth Extra Session 1887), p. 105.)

When the Constitution was adopted, twenty-three of the twenty-four subjects contained in the Act of July 30, 1886, were incorporated in section 26, Article V, with ten other similar subjects. The Act of July 30, 1886, prohibited the territorial legislature from incorporating cities or towns by special Act. Section 26, Article V, of the Constitution, does not contain that prohibition; but in other respects the Constitution follows the exact language of the Act of Congress in prohibiting the legislature from passing any local or special laws for granting divorces, changing the names of persons or places, locating or changing county seats, etc.

3. *Under the Constitution.* Since the adoption of the Constitution, eleven counties had been created when the Act now under consideration was before the legislature. The provisions of the several Acts creating Flathead, Teton, Carbon, Granite, Sweet Grass, and Sanders counties are similar, and similar to the provisions of the Act now under consideration. A temporary or provisional county seat was named, and provision made for an election by the voters of the respective counties to finally fix and determine the location of a permanent county seat. In the Acts creating Valley, Ravalli, Broadwater, and Rosebud, a temporary or provisional county seat was named, and the Act in each instance provides that the place so named shall be the county seat, "until some other place within said county shall be designated as such in the mode and manner provided by law" (Valley County Act [Laws 1893, p. 202]); or "until some other place * * * shall be designated as provided by law" (Ravalli County Act [Laws 1893, p. 209]; Broadwater County Act [Laws

1897, p. 45]); or "until the permanent county seat shall be designated in the mode and manner provided by law" (Rosebud County Act [Laws 1901, p. 97]). The Act creating Powell county provides that Deer Lodge "shall be and remain, until lawfully changed in the manner provided by law, the county seat of Powell county." (Laws 1901, p. 101.)

It will be observed that during the first period above, the territorial legislature had resorted to each of three methods for locating permanently county seats: (1) By permitting the voters to determine the question by ballot, as in the original counties and Meagher county; or (2) by naming the permanent county seat in the Act creating the county, as in Dawson, Silver Bow, Yellowstone, and Fergus; or (3) by locating the permanent county seat by a separate special Act, as in Custer county. But no matter which method was employed, the subject was controlled by a special Act in every instance, and this fact is peculiarly pertinent when we undertake to analyze the Act of [1] Congress of July 30, 1886. By that Act the Congress said to the territorial legislature of Montana: "Hereafter you shall not pass special laws for granting divorces, changing the names of persons or places, locating or changing county seats, regulating the practice in courts of justice, etc., and in all other cases where a general law can be made applicable, no special law shall be enacted." The language is perfectly plain, but what does it mean? Did the Congress intend to say to the legislature: "You shall not pass a special law granting a divorce to John Doe, but you may submit the matter by a special Act to the voters of his community to determine by ballot whether or not John Doe shall be relieved from the bonds of matrimony?" Did it intend to say to the legislature: "You shall not pass a special Act changing the name of Sing On, but you may by special Act authorize some other body to do so, or you may submit the question to a vote of the people of Lewis and Clark county?" Or did it not mean to say: "You shall not pass special laws upon any of these subjects, and neither shall you accomplish the same purpose, by indirection, by referring the matter by special Act to any other body?" In other words, is it not perfectly ap-

parent that the Congress meant to say: "These subjects shall hereafter be controlled by general laws of uniform operation, and not otherwise?" To say that the Congress intended that the territorial legislature might by special law refer any of the matters just enumerated to a vote of the people would be so ridiculous that it would not be insisted upon by anyone. If that is true, why should a different rule be applied to the provision relating to the location of a county seat? No distinction is made in the Act between the different subjects treated, and there cannot be suggested a reason for one rule as to the others and a different rule as to this last one. That the Congress intended that all of these enumerated subjects should be controlled by general laws is perfectly manifest.

We are not left in doubt altogether or entirely free to speculate as to the intention of the Congress in passing this measure; for, aside from the manifest purpose contained in the concluding clause of section 1, the legislative history of the Act precludes the possibility of a doubt. The bill for the Act (H. R. 5179) was introduced in the House of Representatives by William M. Springer, of Illinois. It was referred to the committee on territories, of which Mr. Springer was a member, favorably reported, and the report adopted. The Congressional Record discloses that when the bill was up for final passage in the House, its author, Mr. Springer, said: "Mr. Speaker, the provisions of this bill are copied *verbatim* from the Constitution of the state of Illinois, and similar provisions will be found in the Constitutions of most of the states of the Union. The bill simply prohibits the passage, in the cases enumerated, of local or special laws in the territories. I think one of the greatest abuses in the territories has been the passage of laws of this character. *This bill, if passed, will require general laws on these subjects, instead of special ones.* The subject has been discussed in most of our states in the formation of our state Constitutions, and wherever provisions of this character have been adopted the most salutary results have followed. I think the same benefits should be extended to the territories." (Vol. 17, Cong. Rec. 4062.) There was not any further discussion of the measure on its merits in

either branch of Congress, but this construction of it by its author appears to have been accepted as correctly voicing the intention of Congress in passing the measure.

In *State ex rel. Hay v. Hindson*, 40 Mont. 353, 106 Pac. 362, this court announced the universal rule of statutory construction [2] as follows: "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter. * * * Necessarily, the courts must look to the statute itself, its history, or both, for the key to the legislative intent." Applying this rule, and the Act of July 30, 1886, in plain and unmistakable terms declared that a permanent county seat in any of the territories could be located thereafter only by a general law.

It might appear that undue prominence has been given to the Act of July 30, 1886, and the manifest intention of the Congress in passing it; but not so. When our constitutional convention assembled in 1889, it took the provisions of the Act of July 30, 1886, bodily and incorporated them in section 26 of Article V, without the change of a word, eliminating only one provision, that against the incorporation of cities and towns. This is conceded by counsel for relator in their original brief. If the framers of our Constitution meant anything, then, by thus borrowing from the Act of the Congress the matters contained in the prohibition in section 26, Article V, they meant to give the same effect to this part of the Constitution as was given to the Act of the Congress. They meant that the same purpose which prompted the enactment of the one likewise prompted the other. They meant that the same intention should be a part of each, and the Congress having manifested its intention that the location of a county seat should be governed exclusively by general laws, the framers of our Constitution intended that the same rule should prevail under statehood. That intention is manifested also by the terms of the Constitution itself. Many of the older states have constitutional prohibitions similar to those contained in section 26, Article V, of ours. In the Constitution of Florida, there is a section (Article III, sec. 20) enumerating a list of subjects upon which the legislature is forbidden to pass local or

special laws; then follows this provision: "In all cases enumerated in the preceding section, all laws shall be general and of uniform operation throughout the state." (Sec. 21.) The Constitution of Iowa (Article III, sec. 30), after enumerating the prohibited subjects, proceeds: "In all the cases enumerated, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." Our Constitution, after enumerating the subjects upon which the legislature is prohibited from passing local or special laws, proceeds: "In all other cases where a general law can be made applicable, no special law shall be enacted." It is not possible that any doubt could arise as to the meaning of that portion of the Florida Constitution quoted above.

But there is not any difference in meaning between the language in the Florida or Iowa Constitution and that in our own Constitution above. When the framers of our Constitution said the legislature shall not pass special laws for granting divorces or locating county seats, they knew that these subjects must of necessity be dealt with by law, and in prohibiting special laws they impliedly commanded that they be dealt with only by general laws. When a special law is prohibited, a general law only can be enacted, for there are not any other kinds. Viewed in the light of the history surrounding its origin, the concluding prohibition of section 26, Article V, of our Constitution above, means just what the Florida Constitution means. "In all cases enumerated all laws shall be general and of uniform operation throughout the state." That the prohibition in [3] section 26, Article V, is absolute does not admit of doubt. (*State ex rel. West v. City of Des Moines*, 96 Iowa, 521, 59 Am. St. Rep. 381, 65 N. W. 818, 31 L. R. A. 186.) In addition to this manifestation by the framers of the Constitution of their intention in drafting the provision in section 26, Article V, it is worthy of note that, since the adoption of the Constitution, the legislature of this state, in treating of any of the enumerated subjects in that section, excepting locating county seats, has done so by general laws. This practice has been absolutely uniform for more than twenty years, and tends at least to evince a legis-

lative construction of our constitutional provision in harmony with the views here indicated. On the other hand, there has not been any uniform construction of the provision, so far as it relates to the location of county seats. Flathead, Teton, Granite, Carbon, Sweet Grass, and Sanders counties were created by special Acts similar to the one now under consideration. But Valley, Ravalli, Broadwater, and Rosebud were created by special Acts in which no provision whatever was made for the location of the permanent county seat in any one of these counties; while in the case of Powell county it would appear that the legislature undertook to locate definitely the county seat of that county in the Act creating it.

Under a Constitution the meaning of which cannot be distinguished from our own, or from the Act of July 30, 1886, the supreme court of West Virginia, in a case involving the same question as is now before us, held that the constitutional prohibition is not limited to forbidding a special law which in terms definitely locates a county seat, but is intended to forbid as well special legislation which seeks to accomplish the purpose by submitting the matter to a vote of the people; in other words, the constitutional prohibition is aimed against the kind of legislation employed for the purpose. (*Groves v. County Court*, 42 W. Va. 587, 26 S. E. 460.)

The framers of our Constitution declared in most vigorous terms that the legislature shall not pass local or special laws upon any subject, if a general law can be made applicable, and by prohibiting special laws upon the particular subjects enumerated in section 26, Article V, they declared that general laws can be made applicable to all of those subjects, one of which is locating or changing county seats.

The cases which recognize the right of the legislature by special Act to designate a temporary county seat for a newly created county make a clear distinction between a temporary or provisional county seat and a county seat actually located. (*Doan v. Board of Commissioners*, 2 Idaho, 781, 26 Pac. 167; *Attorney General v. Board*, 64 Mich. 607, 31 N. W. 539.)

In their original brief counsel for relator say: " 'Locating' means establishing a fixed and permanent county seat, and 'changing county seats' means the removal of an established, fixed, and permanent county seat to another established, fixed, and permanent county seat." We agree with this fully, and we may add: To remove a county seat means to change it from one fixed place to another fixed place. As used in the Constitution, with reference to county seats, "change" and "remove" of necessity mean the same thing and are used interchangeably, or as synonymous. The provision with reference to locating a county seat is operative only before a permanent county seat has been fixed or established, while the provisions relating to change or removal are operative only after a permanent county seat has been established. (*Doan v. Commissioners, supra.*) The cases dealing with questions of removal of county seats cannot have any application to the question involved here.

We assume, for the purposes of this case, that the legislature may by special Act create a county and name a provisional county seat, but beyond that it cannot go, so far as any question involved here is concerned. But it is suggested that the failure of the legislature to pass a general law for the location of county seats would defeat the will of the framers of the Constitution in drafting section 26, Article V, and the will of the people in adopting it, by continuing the provisional county seat for an indefinite period of time, and this may be so; but the same thing may also occur in many other instances. Our Constitution contains at least seventeen distinct provisions, in each of which the legislature is commanded to do some particular Act; but there is no means of coercing the legislature, and its failure to respond in these particulars, or in any of them, to that extent defeats the will of the framers of the Constitution and the people. But for such failure, if any, on the part of the lawmakers, the people always have a means of redress at the polls. But the fact, if it is a fact, that the legislature has been derelict in failing to pass [4] a general law for the location of permanent county seats does not justify a special law which is prohibited. As between

the Constitution and the laws of this state, the Constitution is supreme, and in determining the question before us we have but to compare the Act in question with the Constitution, and if they conflict it is our duty to uphold the Constitution, let the consequences be what they may be. Our last legislative assembly, apparently recognizing the necessity for a general law for locating county seats, passed a measure evidently designed to supply the deficiency in our laws.

It is also suggested in the brief of counsel for relator that, if this Act cannot be upheld as one providing for a vote to locate the permanent county seat, it can be upheld as one providing for a vote upon the question of a *temporary county seat*; but this cannot be so. Such a conclusion would be directly antagonistic to the manifest intention of the legislature. Section 3 of the Act creating Lincoln county provides for submitting to the voters the question of the location of a permanent county seat, and it was upon that question that the people voted, not upon the question of a temporary county seat.

The Act creating Lincoln county, in so far as it attempts to make provision for the permanent location of the county seat, is unconstitutional and void, being a local and special Act directly prohibited by section 26, Article V of the Constitution. This conclusion does not interfere in the least with the application of the principle of local self-government. We do not hold that the people of Lincoln county may not by vote determine where the permanent county seat shall be located. We do say that if they proceed to that end, it must be done under a general law of uniform operation.

The motion and demurrer are sustained, and this proceeding is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY: When this case was first decided, I was inclined to the view that the provision of the Act permitting the voters of Lincoln county to locate the permanent county seat is not open to the objection that it is special legislation within the purview of the Constitution; but, upon examination

of the history of the prohibition and further consideration of the purpose had in view by its adoption, I am satisfied that the conclusion reached by MR. JUSTICE HOLLOWAY is correct. I therefore concur.

MR. JUSTICE SMITH dissents.

STATE, RESPONDENT, *v.* WAKELY, APPELLANT.

(No. 2,983.)

(Submitted May 11, 1911. Decided May 27, 1911.)

[117 Pac. 95.]

Criminal Law—Gaming—Information—Sufficiency—Evidence—Cross-examination—New Trial—Misconduct of Jurors—Accomplices—Newly Discovered Evidence.

Gaming—Information—Sufficiency.

1. An information alleging that accused operated and ran a game of studhorse poker, a game of chance played with cards for money, charges a violation of Revised Codes, section 8416, punishing any person operating or running, as principal, agent, or employee, any game of studhorse poker, the allegation showing that accused was not a player, but was the proprietor, or agent, or employee in charge.

Criminal Law—Harmless Error—Exclusion of Evidence.

2. Where a detective, testifying for the state, stated on cross-examination that he worked for \$75 a month and expenses, the refusal to allow him to further state whether he worked for a salary or on a commission was not prejudicial to accused.

Same.

3. Where a detective, testifying for the state on a trial for gambling, stated on cross-examination that he was brought to a town by the county attorney to look up gamblers, the refusal to allow him to answer the further question as to what brought him was not prejudicial to accused.

Same.

4. Refusal to allow a detective, testifying for the state, to testify on cross-examination as to the street and number of his residence in a distant city, or as to what his occupation was before he entered the employ of a detective agency, was not prejudicial to accused.

Cross-examination—Questions Assuming Facts.

5. A question asked a witness on cross-examination, which erroneously assumes that the witness has made a statement in his examination, is properly excluded.

Same—Impeachment of Knowledge.

6. Where a detective for the state, on a trial for operating games of chance, testified that he was familiar with the games, that he had seen them played, but had never played them, it was immaterial to inquire how he gained his knowledge of such games.

Criminal Law—Harmless Error—Exclusion of Evidence.

7. Where, on a trial for gaming, the evidence showed that two detectives testified for the state, the refusal to allow one of them to state on cross-examination what sign he employed to convey the information to the other that the cards were marked, was not prejudicial to accused, the question merely testing the credibility of the detective.

Same—Witnesses—Interest in Litigation.

8. The interest a detective who testifies for the state has in the result of the prosecution is material, and it is proper to ask him whether he is employed on a salary or a commission, and thus to show that his testimony may be influenced by the fact that he will receive extra compensation for testimony securing a conviction.

Same—Cross-examination.

9. Where a detective, testifying for the state, stated on cross-examination that the money received from a third person was paid to a detective agency from which he received his compensation, the sustaining of objections to questions, "How much did you draw from [third persons]? Did you turn it into the agency or did you keep it?" was not error.

Same—Cross-examination—Latitude.

10. The trial court should allow the utmost latitude in the cross-examination of detectives testifying for the state, and thereby enable the jury to determine the credit to be given to them.

Same—New Trial—Misconduct of Jurors.

11. That jurors, during their deliberations, examined a court calendar in the jury-room and discovered that there were two criminal cases against accused for the same offense, and that the argument was advanced by jurors that accused must be guilty because of the two cases, may not be shown by affidavits of jurors, within Revised Codes, section 9350, subdivision 4, authorizing a new trial when the verdict has been decided by lot, or by any means other than a fair expression of opinion of all the jurors; but the misconduct is within subdivision 2, authorizing a new trial when the jury received out of court any evidence, other than that resulting from a view of the premises, and cannot be shown by the jurors themselves.

Same—“Accomplices”—Who are.

12. Under the rule that an accomplice must unite in the commission of the crime and must be an associate therein, one participating in a gambling game operated by another in violation of Revised Codes, section 8416, is not guilty of any offense, and, therefore, is not an accomplice within section 9290, providing that a conviction cannot be had on the testimony of an accomplice, unless corroborated.

Same—Appeal—Invited Error.

13. Accused, bringing out for the first time a matter on cross-examination, may not ask that the testimony be stricken out.

Same—Evidence—Question for Jury.

14. Where a witness testified to a conversation with a bartender of accused, and stated that accused was close enough to hear the conversation, and the witness subsequently stated that he did not talk loud enough to enable accused to hear him, the weight of his testimony on the subject was for the jury, and a motion to strike out the testimony

on the ground that accused did not hear the conversation was properly denied.

Gaming—Evidence—Admissibility.

15. On a trial for operating a game of chance, the propriety of allowing a state's witness to testify as to who put up the most money, who lost the most, and who won the most was within the court's discretion.

Criminal Law—New Trial—Newly Discovered Evidence—Diligence.

16. An application for a new trial on the ground of newly discovered evidence was properly denied, in the absence of any showing that the presence of the witness was not procurable at the trial at the time a state's witness first mentioned his name, or that any effort had been made to secure the testimony of such witness.

Appeal from District Court, Ravalli County; Henry L. Myers, Judge.

WILLIAM WAKELY was convicted of gambling, and appeals from the judgment and an order denying him a new trial. Affirmed.

Mr. C. S. Wagner, for Appellant, submitted a brief and argued the cause orally.

The first specification of error is based upon the proposition that the information does not state facts sufficient to constitute a public offense. The law is directed specifically against one who unlawfully and willfully carries on, opens, conducts, etc., a game of chance, for money, etc., as principal, agent or employee. The defendant is charged in neither of the capacities enumerated by the statute. The information should, therefore, be held to be fatally defective. (*State v. Hardwick* (Wash.), 114 Pac. 873; *State v. Dennison*, 60 Neb. 157, 82 N. W. 383; *Brazele v. State*, 86 Miss. 286, 38 South. 314.)

The court erred in curtailing the cross-examination of the state's witnesses, Dillon and Lewellyn. Under the legitimate scope of cross-examination, the defendant, without a formal offer, had a right to inquire, and the jury a right to know, whether these witnesses were working as detectives on a commission basis or a straight salary; i. e., getting so much per conviction, or receiving the same pay irrespective of the outcome of any case upon which they might be called upon to testify. We do not conceive the rule to be that an offer of proof is necessary

to every question to which an objection is interposed, especially where the object sought to be attained is manifest, and the theory of the examination is plain. The interest, bias or motive of a witness in giving testimony in a given cause is certainly relevant to the issue. "Cross-examination on matters either directly in issue or directly relevant to the issue is a matter of right, and its exclusion is error." (*Prout v. B. L. & S. Co.*, 77 N. J. L. 719, 73 Atl. 486, 25 L. R. A., n. s., 683; see, also, *Sayres v. Allen*, 25 Or. 211, 35 Pac. 254; *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805; *State v. Howard*, 30 Mont. 518, 77 Pac. 50; *State v. Rodgers*, 40 Mont. 248, 106 Pac. 4; *State v. Rhys*, 40 Mont. 131, 105 Pac. 494; *Territory v. Garcia* (N. M.), 110 Pac. 838.) The refusal of the trial court to permit cross-examination on matters relevant to the subject matter of the direct examination was said to be a question of law, and not of discretion in *Campau v. Dewey*, 9 Mich. 381; cited in *Prout v. B. L. & S. Co.*, 77 N. J. L. 719, 73 Atl. 486, 25 L. R. A., n. s., 684. To the same effect is the case of *City of Florence v. Calmet*, 43 Colo. 510, 96 Pac. 183.

In 3 Encyclopedia of Evidence, 349, it is said that anything which tends to show that in the circumstances in which he is placed the witness "has a strong temptation to swear falsely, * * * his interest, whether as employee, * * * reward for conviction," etc., ought not to be withheld from the jury. (See, also, *People v. Rice*, 103 Mich. 350, 61 N. W. 540; *People v. Worthington*, 105 Cal. 166, 38 Pac. 689.)

Lewellyn and Dillon participated in the game alleged to have been played. They were defendant's accomplices, and the former could, therefore, under section 9290, Revised Codes, not be convicted on their testimony, unless corroborated by other evidence. (See *State v. Light*, 17 Or. 358, 21 Pac. 132; *English v. State*, 35 Ala. 428; *State v. Geddes*, 22 Mont. 82, 55 Pac. 919.)

For misconduct of the jury in taking a court calendar into the jury-room and using its contents as an argument to influence certain of its members, a new trial should be granted, under subdivision 4, section 9350, Revised Codes, for thereby the verdict was reached by "other means than a fair expression on the part

of all the jurors." (See *People v. Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207.)

A new trial should have been granted on the ground of newly discovered evidence, which defendant could not, by the exercise of reasonable diligence, have discovered and produced at the trial.

Mr. Albert J. Galen, Attorney General, and *Mr. W. S. Towner*, Assistant Attorney General, submitted a brief in behalf of Respondent. *Mr. Towner* argued the cause orally.

The defendant assigns as error that "the verdict of the jury is contrary to the evidence and the law." It may be admitted that there is a conflict between the witnesses for the state and the witnesses for the defense, but we submit that it is not within the province of the appellate court to determine the credibility of the conflicting evidence. "The presumption is in favor of the verdict, and the appellate court will not interfere if there be material evidence tending to support the verdict; the question of credibility is one for the jurors and not the appellate court." (*State v. Byrd*, 41 Mont. 605, 111 Pac. 407; *State v. Conway*, 38 Mont. 42, 98 Pac. 654; *State v. Ford*, 26 Mont. 1, 66 Pac. 293; *State v. Howell*, 26 Mont. 3, 66 Pac. 291; *State v. Hurst*, 23 Mont. 484, 54 Pac. 911; *State v. Allen*, 23 Mont. 118, 57 Pac. 725.)

The defendant's attempted examination of the state's witnesses was more in the nature of an effort on his part to ridicule them in the eyes of the jury than to fairly bring out the facts and circumstances surrounding the commission of the offense as testified to on direct examination. "It is the right of a witness to be protected from irrelevant, improper or insulting questions; or from harsh or insulting demeanor." (Sec. 8031, Rev. Codes.)

As to none of the assignments in this respect does the brief of the appellant indicate wherein he was prejudiced by the court's rulings. This court will not assume that he was. (*State v. Vanella*, 40 Mont. 341, 106 Pac. 364; *State v. Byrd*, 41 Mont. 585, 111 Pac. 407.)

A new trial on the ground of newly discovered evidence was properly denied. "The defendant is not entitled to a new trial on the ground of surprise in testimony of a witness, where such testimony is immaterial; and the objection as to surprise, made after the verdict, comes too late." (*Bissot v. State*, 53 Ind. 408; *Nickens v. State*, 55 Ark. 567, 18 S. W. 1045; *State v. Chambers*, 43 La. Ann. 1108, 10 South. 247.) "The defendant must apply for a postponement of the trial when the surprise appears." (*Overton v. State*, 57 Ark. 60, 20 S. W. 590; *Parker v. State*, 81 Ga. 332, 6 S. E. 600; *State v. Bottorff*, 82 Ind. 538; *Bryant v. State*, 35 Tex. Cr. 394, 33 S. W. 978, 36 S. W. 79.) "A new trial should not be granted in a criminal case for newly discovered evidence which is not so material that it would probably produce a different result." (*People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *People v. Howard*, 74 Cal. 547, 16 Pac. 394; *People v. Demasters*, 109 Cal. 607, 42 Pac. 236.) The very facts, which the appellant claims might be proven by witness Peck were testified to by witnesses Wakely and Carr on the part of the defendant. "A new trial will not be granted for newly discovered evidence which is merely cumulative." (*People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *People v. Demasters*, 109 Cal. 607, 42 Pac. 236; *People v. O'Brien*, 78 Cal. 41, 20 Pac. 359.) At best the only purpose of the testimony of Peck would be to impeach the witness Lewellyn. "The general rule is that a new trial will not be granted merely for the purpose of admitting cumulative evidence, or to impeach a witness." (*Fletcher v. People*, 117 Ill. 184, 7 N. E. 80; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Loui Tung*, 90 Cal. 377, 27 Pac. 295.)

MR. JUSTICE SMITH delivered the opinion of the court.

The defendant was charged, by information filed in the district court of Ravalli county, as follows: "That he did unlawfully and willfully carry on, open, and cause to be opened, conduct, and cause to be conducted, operate, and run a game of studhorse poker; the same being a game of chance played with cards, for money, checks, and representatives of value." He was

found guilty by verdict of a jury, and appeals from a judgment of conviction and also from an order denying a motion for a new trial. Section 8416, Revised Codes, under which the defendant was prosecuted, reads, in part, as follows: "Any person who carries on, opens, or causes to be opened, or who conducts or causes to be conducted, or operates, or runs, as principal, agent, or employee, any game of * * * studhorse poker * * * is punishable by a fine," etc.

The first contention of the appellant is that the information does not state facts sufficient to constitute a public offense in that [1] it fails to allege whether he acted as principal, agent, or employee, or that he acted in either capacity. Such an allegation is not necessary. The purpose of the statute is to declare an agent or employee who commits any of the prohibited acts guilty to the same extent as would be the case if he were principal or proprietor, and the allegation that he carried on, opened, conducted, and ran the game is sufficient to show that he was not a mere player, but that he was the proprietor or his agent or employee in charge of the game.

2. It is contended that the court erred in unduly restricting the cross-examination of two of the state's witnesses. The record shows that these two witnesses were what is commonly known as detectives. Their names were Dillon and Lewellen. They both testified that on the night of August 19, 1910, they played a game of studhorse poker in the defendant's saloon at Hamilton; that the defendant and his barkeeper, Carr, both played in the game; that the defendant personally "banked" the game, sold chips representing money values, and took a "rakeoff." The defendant and Carr testified that no such game, or any game, was played in the saloon on the night in question, or at any other time. The following proceedings will illustrate the point sought to be made by the appellant in this assignment of error. Dillon testified on cross-examination: "I am a detective in the employ of the Swain Detective Agency. I have been in the employ of that agency for about two years. Q. Were you working for a salary or commission? (An objection to the question as

incompetent, irrelevant, and immaterial was sustained, and exception noted to the ruling.) Witness continuing: I did not see any subpoena. Mr. McCulloch, the county attorney, sent for me. Q. Where were you when you were sent for? (Objection sustained.) Ravalli county is paying my expenses, suppose. I am being paid \$75 a month and my expenses. I lived in Spokane five years. Q. You spent most of your time in Missoula during that time? (Objection sustained.) Q. What brought you here last August? (Objection sustained.) I stayed here sixteen days while I was here last August. I was in the employ of the county of Ravalli at that time. I am in the employ of a detective agency in Spokane. I draw my salary from the detective agency. I am drawing a salary of \$75 a month. Ravalli county pays the company. I have been in the employ of the Swain Detective Agency for two years. I have a regular home. I live in Spokane, Wash. Q. What street and number? (Objection sustained.) Q. What was your occupation before you entered the employ of the detective agency? (Objection sustained.) The first studhorse poker I ever played was when I was a kid. I have played it whenever my operations required it. Q. Do you mean to say from the time you were a kid until you entered the employ of the detective agency you didn't play studhorse poker? (Objection sustained.) I am familiar with draw poker, stud poker, black jack, three-card monte, and faro bank. Q. How did you gain your knowledge of three-card monte and faro bank? (Objection sustained.) I revealed to Lewellen the fact that the cards we were playing with that night were marked. Q. Was it a general sign you used that might convey any meaning? (Objection sustained.)"

Lewellen testified on cross-examination: "I never had any subpoena served on me. I came here at the solicitation of the county attorney. I was brought over here by the county attorney in August to look up the gamblers. I was paid by the county. I drew the money from Mr. McCulloch. I have known Mr. Dillon a little over a year. I made his acquaintance in Spokane. He was a detective. I and Dillon came here together. I and Dillon together drew our money from the county, or from

Mr. McCulloch. We drew our money at the same time from Mr. McCulloch. Q. How much did you draw from Mr. McCulloch? (Objection sustained.) Q. Do you draw a salary from the agency you are employed with now? (Objection sustained.) In the trial of this case and in the gathering of evidence for it, I suppose I am in the employ of Ravalli county; I and Mr. Dillon have both been so employed since we first undertook to get evidence in this case. The money is paid to the detective agency, and we are paid by them. The system is that whatever we get out of this we will turn it into the agency, and the agency will pay us; that's the dope. Q. Was that the dope last summer when you drew the money from Mr. McCulloch? A. What do you mean? Q. When Mr. McCulloch paid you the money; what did you do with it? Did you turn it into the agency, or did you keep it? (Objection sustained.) A. I remember talking over with Mr. Carr whether I brought my girls with me from Missoula. Q. What did you tell him? (Objection sustained.)"

The defendant was not prejudiced by the refusal of the court to allow the witness Dillon to answer whether he was working [2] for a salary or on commission, for the reason that he was afterward allowed to testify that he was working for \$75 per month and expenses. While it is true that the court refused to allow him to answer the question, "What brought you here last August?" we think it sufficiently appears, as testified to later [3] by Lewellen, that they were brought to Hamilton "by the county attorney to look up the gamblers." While the court might very properly have allowed him to testify as to the street [4] and number of his residence in Spokane, we do not regard the fact that he was not permitted to do so as amounting to prejudicial error. The same may be said of the refusal to allow him to answer the question, "What was your occupation before you entered the employ of the detective agency?"

There was no error in sustaining an objection to the question, "Do you mean to say that from the time you were a kid until you entered the employ of the detective agency you didn't play studhorse poker?" The witness had made no such statement. [5] Inquiry might properly have been made as to how often he

had played the game; but we do not understand from the record that there was any refusal to allow such inquiry. We think it was immaterial how he gained his knowledge of three-card [6] monte and faro bank. He testified that he was familiar with those games, but that he had never played them. He said, however, that he had seen them played.

There was no prejudicial error in refusing to allow him to state what sign he employed to convey the information to Lewellen that the cards were marked. This and similar questions were [7] evidently propounded for the purpose of testing his credibility, and, while under the circumstances, full opportunity for cross-examination should have been afforded, still the extent of the inquiry into those minor details was a matter within the discretion of the court, and we find no abuse thereof. We are frank to say, however, that we fail to understand the reason for some of the court's rulings, or how the defendant's right of cross-examination could have been curtailed to any greater extent, without resulting in a reversal of the judgment and the order denying him a new trial.

It was material to inquire what interest, if any, these witnesses had in the result of the prosecution, and to that end it was proper [8] to ask them whether they were employed on salary or commission. The witness Dillon was allowed to state what his arrangement for compensation was, but the questions propounded [9] to Lewellen, "How much did you draw from Mr. McCulloch?" and, "Did you turn it into the agency, or did you keep it?" were not answered, because of objections thereto on the part of the state. Both of these questions might properly have been allowed. Neither, however, reaches the vital matters to which it was evidently the purpose of counsel to direct the attention of the jury, to-wit, whether the testimony of the witness might have been influenced by the consideration that he received extra compensation for furnishing testimony tending to secure a conviction, and what amount he actually received for his services. Perhaps it is not strictly correct to say, as we said in *State v. Byrd*, 41 Mont. 585, 111 Pac. 407, that the duty devolved upon the defendant to make an offer of proof in the course of

cross-examination; but it must appear in some way that he has suffered prejudice from the court's ruling, and the result is therefore the same. It would have been proper for counsel to have asked Lewellen, as he did Dillon, whether he was working for a salary or on commission; or he might have been asked the direct question what compensation he received for his services. Having testified that the money received from McCulloch was paid to the agency from which the detectives received their compensation, the next and most natural question would have been how much the agency paid the witness. But this particular question was not asked. We shall presume that, had counsel framed his inquiries as above indicated, the learned trial judge would have allowed the witness to answer.

We recognize the duty of trial judges to allow the utmost latitude in cross-examination, especially in cases like this, where the [10] question of the guilt or innocence of a citizen depends entirely upon the credit to be given to witnesses hired to detect violators of the statute; but after a careful study of the record it appears to us that the jury was in possession of sufficient information with regard to these two witnesses to enable them to form a very clear judgment as to whether or not they were entitled to credit. The substantial facts appear in the main to have been brought out. There was no error in refusing to allow Lewellen to state what he told Carr about his girls.

3. In support of his motion for a new trial, the defendant produced the affidavits of four jurors who sat in the case, to the [11] effect that a court calendar was found or produced in the jury-room, showing that there were two criminal cases pending against the defendant for gambling, and that the argument was thereupon advanced by certain jurors that having two cases pending against him he must be guilty; these jurors declared that they believed a verdict of not guilty would have been reached had said calendar not been consulted, and such argument made. But these affidavits cannot be considered. This court held, in *State v. Beesskove*, 34 Mont. 41, 85 Pac. 376, that there is but one exception to the general rule prohibiting jurors from impeaching their own verdict, and that is in cases where

it has been decided by lot, or by any means other than a fair expression on the part of all the jurors. (Rev. Codes, sec. 9350.) But it is argued that the verdict in this case was reached by means other than a fair expression on the part of the jurors, and that therefore they may be heard to impeach it. Not so. The facts here presented do not warrant a general inquiry into the meaning of the phrase "means other than a fair expression on the part of the jurors." Any attempt in that direction would be mere speculation at this time, although it is clear that it has some relation to a situation similar to that of deciding by lot. Paragraph 2 of section 9350, Revised Code, *supra*, provides that a new trial may be granted to a convicted defendant "when the jury has received out of court any evidence other than that resulting from a view of the premises, or any communication, document or paper referring to the case." The alleged misconduct of which appellant complains falls within the provisions of this subdivision, but it cannot be shown by the jurors themselves. The law does not undertake to limit or control the arguments by which one juror may convince the mind of another.

4. It is contended that the witnesses Dillon and Lewellen were accomplices of the defendant, and, their testimony being uncorroborated, the conviction cannot stand. (See Rev. Codes, sec. 9290.) The case of *State v. Light*, 17 Or. 358, 21 Pac. 132, was cited to the point. In that case, however, it was apparently held that under the Oregon statute all who participated in a game of studhorse poker were *particeps criminis*, and therefore accomplices. But under our statute the mere player who does not [12] take part in carrying on, opening, or causing to be opened, conducting, or causing to be conducted, operating, or running the prohibited game, as principal, agent, or employee, is guilty of no offense whatsoever. The statute is plain on this point, and is presumed to express the exact intention of the legislature. Had there been any purpose to punish the player, that body would undoubtedly have so declared. In order to be an accomplice, the person so charged must unite in the commission of a crime; he must be an associate in crime, a partner or partaker

in guilt. As was tersely stated by the court, in *State v. Light, supra*, participation in guilt is what makes an accomplice.

5. The record shows that while the witness Dillon was upon the stand he made this statement: "About 8 o'clock in the evening, the bartender told myself and Lewellen to stick around; there would be a little game of poker that evening." Defendant's counsel moved "to strike from the record as hearsay what the bartender told this witness and Lewellen." "Q. Was Mr. Wakely present when that was told you? A. He was. Q. Did he hear it? A. I do not know. Q. Was he close enough to hear it? A. He was close enough to hear it." The court overruled the motion. Witness continuing on cross-examination: "Mr. Carr talked with me and Lewellen about the game. Mr. Wakely was in the house at the time. I think he was near the cigar-case when we talked it over, 4 or 5 o'clock in the afternoon. I was at the bar, at one particular time Wakely was at the cigar-case. There is a screen that separates the bar from the cigar-case. I was not talking loud enough so that people around there could tell what I said; I am not sure that Wakely heard what I said." Defendant's counsel: "Want to have this evidence stricken from the record, because he testified in his direct examination Mr. Wakely was close enough at all times so he could hear everything that was said." This motion was overruled, and the witness continued: "I was not talking loud enough so Mr. Wakely could hear me in by the cigar-case." Defendant's counsel: "Ask to have the testimony stricken from the record, all evidence with reference to ribbing up any game." Court: "It was brought out on cross-examination. The county attorney didn't bring it out. (Motion overruled.)"

It is difficult to determine whether the conversation referred to by the witness on cross-examination was the same as that mentioned by him on direct examination. If it was not, the court [13] correctly ruled that, having been brought out for the first time on cross-examination, the defendant was not in a situation to ask that the testimony be stricken. On the other hand, [14] if there was but one conversation, the record simply discloses that the witness contradicted himself, and the weight to

be given to his entire testimony on the subject was for the jury to determine. The testimony at most only discloses his reason for remaining about the premises, and amounts to no more than a statement that he was told that a game of poker would be played that evening.

6. We find no error in the action of the court in allowing the [15] state's witnesses to testify, over objection, as to "who put up the most money, who lost the most money, and who won the most." This was a matter within the discretion of the court.

7. One ground of the motion for a new trial was that appellant had discovered material evidence which he could not, with reasonable diligence, have discovered and produced at the trial. Two affidavits were filed in support of this feature of the motion. It appears that Lewellen had sworn at the trial that during the progress of the game one "Ole" had served drinks to the players. The affidavit of one Earl Peck declared that he was the person known as "Ole," that he had not been present on the night in question, and that the testimony of Lewellen to the effect that he was present and served drinks was "wholly false and untrue." It will be readily seen that this testimony would have been very material and beneficial to the defendant [16] at the trial. His affidavit, however, instead of disclosing that he exercised reasonable diligence to procure it, does not show that he made any effort whatsoever. It reads, in part, as follows: "That he heard the testimony of the witness Lewellen respecting the presence of one Ole at his said saloon on the night that the game of studhorse poker was alleged to have been played there, and the serving by the said Ole of drinks at the table where the said game was alleged to have been played; that he is well acquainted with the said Ole; that his true name is Earl Peck; that he had no means of knowing and did not know, either at the time of said trial or prior thereto, that the said witness Lewellen would testify as to the presence of said Earl Peck, alias Ole, at the time said game was alleged to have been played, or that he served drinks to the players; that the said Earl Peck, alias Ole, was not summoned as a witness for the state, and his name did not appear upon either the original information or

the amended information, upon which said cause was tried. Affiant further avers that he could not during the course of said trial, by the exercise of reasonable diligence, or at all, have secured the presence at said trial of the said Earl Peck, alias Ole, for the reason that affiant was not apprised of the fact that any testimony relative to the said Ole would be introduced at said cause until the same was testified to by the said witness Lewellen." The transcript of the testimony shows that the attention of the defendant was directly called to the testimony relating to the presence in the saloon of the person called "Ole," when his counsel interposed an objection to the question, "Do you know whether or not he served any drinks to outside customers during the time you were playing?" There is nothing in Wakely's affidavit to show that the presence of Peck was not immediately procurable at the trial at the time when Lewellen first mentioned his name, or that any effort was made to secure his testimony.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
JUNE TERM, 1911.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH,
THE HON. WILLIAM L. HOLLOWAY,
Associate Justices.

STATE, RESPONDENT, v. NEEDY, APPELLANT.

(No. 2,999.)

(Submitted June 9, 1911. Decided June 10, 1911.)

[117 Pac. 102.]

Criminal Law—Rape—Evidence—Insufficiency.

Rape—What Does not Constitute.

1. The gist of the offense of rape as defined in subdivision 3 of section 8336, Revised Codes, is the use of force by the perpetrator overcoming the physical resistance offered by the female; hence if there be consent, however reluctantly given and even though accompanied by verbal protests and refusals, at any time during the act of intercourse, the act is not accomplished by force within the meaning of the statute, and does not constitute rape.

Same—Evidence—Insufficiency.

2. Evidence held insufficient to justify a conviction for rape charged to have been accomplished by violence and force, but rather to show that the prosecuting witness failed to offer any physical resistance which it required force to overcome within the meaning of subdivision 3 of section 8336, Revised Codes.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

(442).

GEORGE NEEDY was prosecuted for rape and convicted of assault in the second degree, and appeals from the judgment of conviction and an order denying his motion for a new trial. Reversed and remanded, with directions to discharge accused.

Mr. George D. Pease submitted a brief in behalf of Appellant, and argued the cause orally.

In behalf of the State, *Mr. Albert J. Galen*, Attorney General, submitted a brief and argued the cause orally.

Opinion PER CURIAM.

The defendant, charged with rape, was convicted of assault in the second degree and sentenced to serve a term of four years in the state prison at hard labor. He has appealed from the judgment and an order denying his motion for a new trial. The brief filed by his counsel contains many assignments of error based upon the rulings of the court in admitting and excluding evidence, and giving and refusing certain instructions. Contention is also made that the evidence is insufficient to justify the verdict. We shall not notice any of these assignments, except the last; for, after an examination of the evidence, we are satisfied that it is not sufficient to sustain a conviction, either of rape or assault.

The charge in the information is rape by violence and force. "Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances: * * * 3. Where she resists, but her resistance is overcome by violence or force." (Rev. Codes, sec. 8336.) The gist of the offense as here defined is the use of [1] force by the perpetrator overcoming physical resistance offered by the female. If there is consent, however reluctantly it is given, even though accompanied by verbal protests and refusals, at any time during the act of intercourse, the act is not accomplished by force within the meaning of the statute, and hence is not rape.

We shall not examine the evidence in detail. The prosecutrix was a woman twenty-one years of age. The defendant was twenty-four. The two had theretofore gone together to social gatherings and places of amusement. From the testimony of the prosecutrix it appears that when the alleged rape occurred, she and the defendant were on the way to her home from a dance. They were proceeding along a street in the city of Bozeman, about 12:30 in the morning. There were occupied dwellings on both sides of the street, one not to exceed thirty feet away, and in some of them the inhabitants were still awake. Other persons were on the street a short distance away. The point at which the act of intercourse took place was under a tree in the parking about the middle of the block. There was no outcry nor call for help by the prosecutrix, though the defendant used no means, nor even threats, to prevent it. The clothes of the prosecutrix were not disarranged nor torn; nor did her person bear any evidence of bruises occasioned by violence or force used to overcome resistance. During the progress of the intercourse the defendant requested her to put her arms around his neck, and she did so. After the act was completed, the defendant accompanied her to her home some distance away and left her at her door, parting with her as he had theretofore done. On the way she made no complaint, nor sought any help, though she might easily have done so. The only conclusion which this evidence justifies is that, while the prosecutrix may not have given ready consent to the act of intercourse, she did not offer any physical resistance which it required force to overcome, within the meaning of the statute. The result is that the defendant was improperly convicted; for if, under these facts, there was no rape, neither was there an assault.

Since, in view of what the evidence shows, the ordering of a new trial would be useless, it is directed that the judgment and order be reversed, and the cause remanded to the district court, with directions to discharge the defendant. *Remittitur* forthwith.

Reversed and remanded.

STATE, APPELLANT, v. WESTERN UNION TELEGRAPH COMPANY, RESPONDENT.

(No. 2,932.)

(Submitted June 8, 1911. Decided June 12, 1911.)

[117 Pac. 93.]

Taxation—Franchises—Telegraph—Interstate Commerce—Governmental Business.

Telegraph—Interstate Commerce.

1. Upon acceptance by the Western Union Telegraph Company of the provisions of the Act of the Congress passed to aid in the construction of telegraph lines and to secure to the government their use for postal, military and other purposes (14 Stats. at Large, 221), that company became an agency of the federal government for the transaction of its postal business, and an instrumentality of interstate and foreign commerce.

Taxation—Telegraph—Interstate Commerce—Governmental Business.

2. A state may not tax the right to carry on interstate commerce or an agency employed in conducting the business of the government.

Same—Franchise Tax—When Void.

3. Where an assessor had assessed in a lump sum the franchise of a telegraph company doing an interstate, intrastate, as well as governmental business, instead of fixing a separate valuation upon the right of the company to do intrastate private business only, the entire assessment on the franchise was void, and the tax, paid under protest, illegal.

Same—Telegraph—What Part of Franchise Taxable.

4. *Semble*: That a state may tax the right of a telegraph company doing an interstate and intrastate business, to transact intrastate private, as distinguished from governmental, business, seems to be recognized.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by the State against the Western Union Telegraph Company. From a judgment for defendant, the State appeals. Affirmed.

Mr. Albert J. Galen, Attorney General, and Mr. William L. Murphy, Assistant Attorney General, submitted a brief in behalf of Appellant; Mr. Murphy argued the cause orally.

The respondent company is a New York corporation, and is not, therefore, entitled to enter Montana except under the conditions which the Constitution and laws of Montana prescribe for a corporation of like character. (*Paul v. Virginia*, 8

Wall. (U. S.) 168, 19 L. Ed. 357.) But it has a character which excepts it from this rule, first, in that it is a corporation engaged in interstate commerce, and, second, it is operating over the public highways of the state of Montana under authority of an Act of Congress, *viz.*, the Act of July 24, 1866, and the Act of June 8, 1872, declaring all roads kept up and maintained to be post roads. In view of the character of the respondent company, and the enactments of Congress last referred to, the company had and has an undoubted right to bring its lines into the state, and the legislature is and has been powerless either to forbid its entrance or to impose burdens upon it which might hamper it in carrying out its interstate business or performing its offices for the government. But the agreed statement shows that it is engaged in the business of transmitting messages "from point to point within the state of Montana," which business can only be done through the sanction of the laws of this state, and, that sanction having been given, it constitutes a franchise from the state to the company, which under the Constitution and the authority of the case of *Northwestern M. L. I. Co. v. Lewis & Clark County*, 28 Mont. 491, 98 Am. St. Rep. 572, 72 Pac. 982, is property and mandatorily the subject of taxation. Respondent is performing all the functions that might be performed by a local company, all the lines of which are entirely within the state. This privilege, this right to do business, this franchise, is certainly not derived from any grant made either by the federal Congress or by the legislature of New York, the domicile of the company, nor does the privilege follow from the nature of the corporation, being one engaged in commerce between the states. There are a great number of cases decided by the supreme court of the United States which lay down the doctrine that a state cannot prevent the entry of a corporation acting under federal charter or engaged in interstate commerce. Typical of these is the case of *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649. The *Crutcher Case* is easily distinguished from that at bar, in that the Kentucky statute sought to prevent a foreign express company from conducting any business whatsoever before complying with its terms. This

was clearly an unwarranted attempt to place a burden upon interstate commerce in violation of the commerce clause of the United States Constitution. No clearer distinction between these cases can be drawn than that contained in *Osborne v. Florida*, 164 U. S. 654, 17 Sup. Ct. 214, 41 L. Ed. 586. (See, also, *Pullman Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877; *Paul v. Virginia*, *supra*.)

As to whether the franchise tax is levied upon the federal franchise or upon the federal and state franchises together, or only upon the franchise for doing local business, is a question for this court to decide. (*Leffingwell v. Warren*, 2 Black (U. S.), 599, 17 L. Ed. 261; *People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705; *Noble v. Mitchell*, 164 U. S. 367, 17 Sup. Ct. 110, 41 L. Ed. 472.)

The late Washington case of *Western Union Tel. Co. v. Lakin*, 53 Wash. 326, 101 Pac. 1094, 17 Ann. Cas. 718, was relied upon by counsel in the court below, but an examination of that case will show that the court holds the assessment to be an ineffectual attempt to assess a federal franchise without proportioning its value over the entire system. We contend that in this case the levy was made only upon that franchise by which the company carries on its local or intrastate business.

Messrs. William Wallace, Jr., John G. Brown, and R. F. Gaines, submitted a brief in behalf of Respondent. *Mr. Wallace* argued the cause orally. *Mr. Rush Taggart* and *Mr. Francis N. Whitney*, of Counsel.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1909 the assessor of Silver Bow county made an assessment of the property of the Western Union Telegraph Company, in form as follows:

Pole lines consisting of copper and iron wires.....	\$10,445
Office furniture and instruments.....	500
Franchise assessment	2,000

The taxes upon this valuation amounted to \$249.57, and of that amount the telegraph company paid \$204.57, but refused to pay the \$45 representing the tax upon the assessment of \$2,000 for "*franchise*." This action was commenced by the state to enforce the payment of the tax of \$45. The cause was tried upon an agreed statement of facts, and resulted in a judgment for the defendant company. From that judgment the state appealed.

The facts agreed upon, so far as material here, are: (a) The Western Union Telegraph Company is a New York corporation which has been engaged in business in the territory and state of Montana for many years; (b) that on June 5, 1867, defendant company accepted the provisions of an Act of the Congress of the United States entitled "An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," approved July 24, 1866, Chapter 230, 14 Statutes at Large, 221; (c) that the business of the telegraph company consists in transmitting messages by electric telegraph between points wholly within this state and between points within and without the state, and between the officers, agents and departments of the federal government; (d) that the assessment of \$2,000 "represents the valuation by said assessor upon the right or privilege of carrying on the said telegraph business within the said county of Silver Bow."

The only question in dispute here is the right of the revenue officers of this state to collect a tax upon the "*franchise*" of this company. There is not any disagreement as to the meaning of the term "*franchise*," as used in the assessment or as used in the Constitution and statutes of this state.

By the Act of the Congress to which reference is made, the general government granted to telegraph companies, which should accept the provisions of the Act, rights of way over the public domain, along military or post roads, and over, under, or across navigable streams, and also granted the right to take and use public land for stations, and stone, timber, and other materials for construction work. As a consideration for the grant thus made, the government exacted (1) that government

communications should be given priority in transmission; (2) that the rates for government business should be fixed by the postmaster-general; and (3) that the government might purchase all the lines and property of any consenting company. [1] The Western Union company, having accepted the benefits and burdens of this Act, thereby became an agency of the federal government for the transaction of its postal business, and an instrumentality of interstate and foreign commerce. (*City Council of Charleston v. Postal Tel. Co.*, 3 Am. Elect. Cas. 56; *Western Union Tel. Co. v. Mayor* (C. C.), 38 Fed. 552, 3 L. R. A. 449; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067.)

That the state may not tax the right to carry on interstate [2] commerce or to conduct the business of the government is too well settled to be open to argument. (*Telegraph Co. v. Texas*, above; *California v. Pacific Railroad Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Philadelphia & So. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200.)

The business of this company consists in transmitting three distinct classes of messages: (1) Interstate private messages; (2) intrastate private messages; and (3) government messages, interstate and intrastate. It is suggested by the attorney general that it will not be presumed that the assessor attempted to assess the right to do interstate or governmental business, but rather the presumption should be indulged that he intended to assess only the right of the company to do purely local or intrastate private business. If we had before us only the entry on the assessment-roll as indicated above, we might feel somewhat uncertain; but in the agreed statement we are told that the assessment of \$2,000 on "franchise" "represented the valuation by said assessor upon the right or privilege of carrying on the said telegraph business within the said county of Silver Bow." The words "said telegraph business" refer back to the description of the business of the defendant company as given in paragraph 1 of the agreed statement, to-wit: "That for more than

twenty-five years last past said defendant has been and is doing what is commonly called a general telegraph business in all the states and territories of the United States, and among others, particularly the state of Montana and especially the county of Silver Bow therein, and transmitting on its said lines and in the course of the conduct of said business telegraph messages for the public generally as well as those sent from point to point within said state of Montana as those from points without to points within, and from points within to points without said last-named state"; and the further description of the business contained in paragraph 4 of the agreed statement, to-wit: "That all of the telegraph lines of said defendant corporation within the territory that is now included in the state of Montana were constructed and ever since have been maintained and operated by said defendant under and pursuant to the provisions of the said Act of Congress above set forth, and defendant has at all times since said construction and during such maintenance and operation transmitted telegraph messages between the several departments of the governments of the United States and their officers and agents for the government of the United States and relating to the civil, military, postal, and general administration thereof, all as in said Act provided."

The right to carry on *the telegraph business*, then, includes any and all of the business. The words "within the said county of Silver Bow" must refer to business originating or terminating in, or passing through, the offices in Silver Bow county. They cannot be construed to refer to business conducted wholly between points within that county, but even if they did they would still include governmental messages; and, as thus construed, they indicate that the assessor was attempting to fix a valuation on the right or privilege of the company to transact any business [3] whatever within Silver Bow county, and having made his assessment in a lump sum, and not having fixed a separate valuation upon the right of the company to do intrastate private business only, the entire assessment on the franchise becomes void and the tax illegal.

In considering a like question, the supreme court in *California v. Pacific R. R. Co.*, above, said: "It follows that, in each one of the cases now before us, the assessment made by the state board of equalization comprised the value of franchises or property which the board was prohibited by the Constitution of the state or of the United States from including therein; and that these values are so blended with the other items of which the assessment is composed that they cannot be separated therefrom. The assessments are, therefore, void."

It is not necessary to determine whether the state may lawfully tax the franchise of this company or its right to transact intra-state private business only, but that such right exists appears [4] to be recognized by expressions found in each of the following cases: *Telegraph Co. v. Texas*, above; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586. For the reason given, the judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

KELLY, RESPONDENT, *v.* CITY OF BUTTE, APPELLANT.

(No. 2,986.)

(Submitted June 9, 1911. Decided June 17, 1911.)

[117 Pac. 101.]

Appeal—New Trial Order—When Affirmed.

New Trial Order—When Affirmed.

1. An order, general in terms, granting a motion for a new trial, asked for on the ground, among others, that the evidence was insufficient to justify the verdict, will not be disturbed on appeal, where there was a sharp conflict in the evidence on all material issues involved.

Same.

2. The rule, *supra*, that on appeal an order, general in terms, granting a motion for a new trial will not be disturbed, applies as well to an order denying such a motion.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by James P. Kelly against the City of Butte. From an order granting plaintiff's motion for a new trial, defendant appeals. Affirmed.

Messrs. Edwin M. Lamb, John R. Boarman, and N. A. Rotering submitted a brief in behalf of Appellant. Mr. John A. Smith argued the cause orally.

No appearance in behalf of Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by the plaintiff to recover damages for personal injuries alleged to have been occasioned by the negligence of defendant in permitting a sidewalk upon one of its principal streets along which plaintiff was traveling to be in a sunken, slanting, and sloping condition, and in permitting snow and ice to accumulate and remain thereon in "a heaped-up, rough, rounded, uneven, sloping and slanting condition, rendering the same unsafe and dangerous," thus causing the plaintiff to slip and fall. There was a verdict and judgment for the defendant. The appeal is by the defendant from an order granting plaintiff's motion for a new trial. The plaintiff based his motion upon the ground, among others, that the evidence was insufficient to justify the verdict. The court sustained it by a general order. Counsel for plaintiff have not submitted any brief or argument. Counsel for defendant insist that inasmuch as it is apparent from the record that plaintiff was not prejudiced by any ruling during the trial, and that the instructions are correct in point of law, the court was not justified in granting the order.

It is undoubtedly true that when a motion for a new trial is based upon alleged errors of law only, the propriety of the action of the trial court thereon will be determined by an answer to the inquiry: Was prejudicial error committed? If the record re-

quires an affirmative answer, the order granting the motion will be affirmed because the moving party is entitled to a new trial as a matter of strict legal right. In such case the granting or refusing of it does not rest in the discretion of the court (*State v. Schnepel*, 23 Mont. 523, 59 Pac. 927); on the other hand, if prejudicial error has not intervened, the right of the adverse party to have the judgment stand may not be disturbed, and an order granting a new trial will be reversed. When, however, the motion is also based upon grounds which appeal to the discretion of the court, as, for illustration, upon the insufficiency of the [1] evidence to justify the verdict, a general order granting a new trial will not be disturbed, even though no error was committed during the trial which in itself would justify the order, unless it is also manifest that there has been an abuse of discretion; for when the record discloses this condition, this court will presume that the trial court was of the opinion that the evidence was insufficient, and will go no further than to ascertain that it presents a substantial conflict. If it does, the judgment of the trial court will be accepted as conclusive. (*Welch v. Nichols*, 41 Mont. 435, 110 Pac. 89, and cases cited.) In *Welch v. Nichols* it was said: "And though in a given case it may appear that the moving party was not upon any alleged error of law entitled to have his motion granted as a matter of right, the action of the court will be sustained if the evidence presents a substantial conflict, for in such case, unless the order expressly excludes the ground of insufficiency of the evidence, it will be presumed that the court, in the exercise of its discretionary power, granted the motion because it was of the opinion that the evidence was insufficient to justify the finding of the jury." The case of *Copenhaver v. Northern Pacific Ry. Co.*, 42 Mont. 453, 113 Pac. 467, contains nothing in conflict with the rule here stated, as counsel contend, but, on the contrary, expressly recognizes and applies it. In that case the court had under review an order denying a motion for a new trial. Upon review in this [2] court the same rule applies to an order denying as to one granting a motion upon the ground of insufficiency of the evidence.

The evidence submitted in this case is in sharp conflict on all material issues involved. It was therefore entirely within the discretion of the trial court to say that they should be submitted to another jury.

The order is affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

WILSON, RESPONDENT, v. NORRIS, APPELLANT.

(No. 3,002.)

(Submitted May 27, 1911. Decided June 17, 1911.)

[117 Pac. 100.]

Appeal—Dismissal—Statute of Limitations.

Appeal from Judgment—Dismissal, When.

1. An appeal from a judgment will be dismissed if not taken within one year after entry thereof. (Rev. Codes, sec. 7099.)

Statute of Limitations.

2. On April 5, 1904, plaintiff brought an action for an accounting and other equitable relief, which on March 6, 1905, was dismissed without prejudice on his own application; on the same day he commenced a new action which, on May 20, 1907, resulted in a nonsuit on motion by defendant. On July 16, 1907, the third action was instituted. Held, under section 6464, Revised Codes, that the second action, concededly brought in time, having been terminated in a manner other than "by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits," the third one, commenced within one year after such termination, was in time, and a denial of defendant's motion to dismiss the action on the ground that it was barred by the statute of limitations was proper.

Appeal from District Court, Madison County; Llew. L. Callaway, Judge.

ACTION by Thomas J. Wilson against Alex Norris. From a judgment for plaintiff and an order denying him a new trial, defendant appeals. Affirmed.

Cause submitted on briefs of counsel.

Mr. Geo. D. Pease, for Appellant.

Messrs. Kirk, Bourquin & Kirk, and *Mr. S. V. Stewart*, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant has appealed from the judgment rendered against him herein, and from an order denying his motion for a new trial. The judgment was entered on January 29, 1910. The order denying the motion for a new trial was made on January 18, 1911. Notice of appeal from the judgment and order was served and filed on March 13, 1911. The appeal from the [1] judgment was not taken until the lapse of more than one year after its entry, and is therefore not before us. (Rev. Codes, sec. 7099.) It is accordingly dismissed.

The plaintiff brought the action to compel the defendant to account to him for the value of his share of the increase of a herd of cows and a band of mares, which, it is alleged, the defendant delivered to the plaintiff in the spring of the year 1901, to herd, care for, and breed, under a verbal agreement; that in consideration of his services in that behalf and the care by plaintiff and his wife of certain ranches situate in Madison and Carbon counties, the plaintiff was to receive one-half of the increase, the defendant agreeing to pay certain specified items of expense and to furnish necessary hired help. It is alleged that the agreement was to continue in force so long as the parties were mutually satisfied, but that it was determinable at the option of either party, whereupon all of the old animals then living were to be returned to the defendant, and the increase not theretofore sold should be equally divided. It is further alleged that the agreement continued in force, the plaintiff having observed all of its terms and conditions, until April 1, 1904, when the defendant terminated it, and, contrary to its provisions, wrongfully took exclusive possession both of the old animals and the increase, except such as had died or been sold, and still retains such possession, refusing to account to the plaintiff for any part of the

increase or for his share of the proceeds of the sale of a large number of calves and colts, made by defendant during the time the agreement was still in force. The prayer is (1) that the defendant be required to account for the proceeds of all sales made during the life of the agreement, and to pay to plaintiff his share thereof; (2) that the property still unsold be partitioned between the parties, if partition can be made without material injury to their respective rights, or, otherwise, that the property be sold and the proceeds divided equally; (3) that an injunction issue restraining the defendant from making other sales, and that a receiver be appointed to take charge of the property pending the litigation; and (4) that plaintiff have general relief.

Among other defenses which are not now in question, the defendant relied on the limitations prescribed by subdivisions 2 and 3 of section 6449, and subdivision 3 of section 6447, of the Revised Codes. At the close of plaintiff's evidence the court denied a motion by defendant to dismiss the action on the ground that it was barred, holding that it did not fall within any of the limitations pleaded. Whether the ruling was correct is the only question submitted for decision.

Counsel for defendant has devoted much space in his brief to a discussion of the character of the action. He argues (1) that it is an action for trespass on personal property and is barred by subdivision 2 of section 6449, fixing the limitation at two years; or (2), in case this is not the class in which it falls, that it is for the taking, detaining or injuring of personal property and is barred by the same limitation prescribed in subdivision 3 of this section; or (3) that otherwise it is clearly an action upon "an obligation or liability, not founded upon an instrument in writing, other than a contract, account or promise," and hence must fall within, and is barred by, the limitation of three years prescribed by subdivision 3 of section 6447. Counsel for plaintiff contend that it is an action for an accounting, and hence that the limitation of five years, prescribed by section 6451, applies. It follows therefore, they say, that the defendant's motion was

properly denied. It is not necessary to determine any of these contentions.

The agreement was terminated by the defendant and possession assumed by him on April 1, 1904. This is the third action [2] brought by the plaintiff for the cause determined in this case. The first was brought on April 5, 1904. This was dismissed upon plaintiff's own application, but without prejudice, on March 6, 1905. On the same day another action was commenced. The trial of this latter, on May 20, 1907, resulted in a judgment of nonsuit on motion by the defendant. The present action was brought on July 16, 1907, or within one year thereafter. No question is or can be made that the second action, a substitute for the first, was brought in time. From an inspection of the record in this latter case, the material parts of which are incorporated in the bill of exceptions, it is apparent that it was terminated in a manner other "than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits." Therefore, the action of the trial court in denying the motion was correct. (Rev. Codes, sec. 6464; *Glass v. Basin & Bay State Min. Co.*, 34 Mont. 88, 85 Pac. 746; *Id.*, 35 Mont. 567, 90 Pac. 753.).

The order is affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

McCRIMMON, RESPONDENT, v. MURRAY, APPELLANT.

(No. 3,017.)

(Submitted June 13, 1911. Decided June 22, 1911.)

[117 Pac. 73.]

Contracts—Performance to Satisfaction of Party—Variance—Instructions—Evidence—Declarations of Party—Res Gestae.

Contracts—Performance to Satisfaction of Party—Evidence—Sufficiency.

1. Evidence in an action to recover on an alleged oral promise to pay plaintiff for information relative to a vein of ore in defendant's quartz claim, knowledge of the existence of which was gained by the former

while working in an adjoining property, if such information prove satisfactory to promisor, held sufficient to go to the jury upon the question whether the agreement was made as alleged.

Variance—Failure of Proof.

2. Where the evidence fails to establish the alleged cause of action in its general scope, there is presented, not a case of variance, but a failure of proof.

Contracts—Performance to Satisfaction of Party—Construction.

3. Whether the information sought by defendant was satisfactory to him was a matter exclusively for his own judgment, exercised honestly and in good faith, his good or bad faith to be inferred from his declarations and conduct subsequent to an examination of the premises made by him, and the value of the information.

Same—Interpretation—Office of Court.

4. In adjudicating rights under a contract, a court's only office is to enforce such rights as fixed by their own agreement; it cannot make a contract for them and determine their respective rights accordingly.

Same—Instructions Inapplicable to Issues—Error.

5. The principal issue presented by the pleadings was whether defendant had agreed to pay plaintiff a certain sum, provided the information claimed by the latter to be in his possession should prove *satisfactory* to the former; there was sufficient evidence to go to the jury on this point. While some testimony was admitted that the information was valueless, in other instances such evidence was excluded as immaterial. The court in its instructions charged the jury that defendant was liable if the information was proved to have been *valuable*. Held, error as submitting the case upon an issue outside the pleadings.

Appeal and Error—Instructions—Inapplicability.

6. The argument that because an action had been twice tried and the same result reached, a new trial should not be ordered, has no weight where notwithstanding the complaint had been so amended after the first trial as to eliminate a material allegation, the court in its instructions so treated the case as to authorize a verdict in favor of plaintiff upon a question no longer relied on for recovery by reason of the amendment.

Same—Declarations of Party—Cautionary Instruction—When Refusal Error.

7. Held, that though the propriety of giving an instruction in the words of paragraph 4, section 8028, Revised Codes, that "the oral admissions of a party are to be viewed with caution," is a matter of discretion in the trial court, refusal to give it in this instance was error.

Same—Instructions—When Refusal not Error.

8. Refusal to give instructions is not error where those given substantially cover the law embodied in those requested.

Evidence—Declarations of Party—*Res Gestae*.

9. What defendant said and did while engaged in making an examination of the underground workings in his claim to determine the character and value of the vein to which the information, claimed to have been given him by plaintiff, related, was competent to be elicited from a witness who accompanied him on his tour of inspection; the evidence tended to show the state of defendant's mind produced by his observations and was part of the *res gestae*.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Duncan McCrimmon against James A. Murray. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed and remanded.

Mr. James E. Murray, for Appellant, submitted a brief and a reply brief, and argued the cause orally.

On the issues framed by the pleadings herein it was incumbent upon the plaintiff to establish a contract by the terms of which the defendant Murray agreed to pay the plaintiff the amount claimed, "if the alleged information was found satisfactory." There is not any evidence in the record establishing, or tending to establish, the contract alleged in the pleadings, and plaintiff must recover, if at all, upon the cause of action set out in the complaint and not upon some other matter which may be developed by the proofs. (*Reed v. Norton*, 99 Cal. 617, 34 Pac. 333; *Cox v. McLaughlin*, 63 Cal. 196; *Spellman v. Rhode*, 33 Mont. 26, 81 Pac. 395; *Kalispell Liquor Co. v. McGovern*, 33 Mont. 394, 84 Pac. 709; *Forsell v. Pittsburgh Co.*, 38 Mont. 413, 100 Pac. 218; *Flaherty v. Butte Electric Ry. Co.*, 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 416; *Knuckey v. Butte Electric Ry. Co.*, 41 Mont. 314, 109 Pac. 979.)

Because testimony of oral admissions of a person is peculiarly subject to the fallibility of human memory, and because it is easily fabricated, imperfectly comprehended, wrongly interpreted, or misunderstood, courts declare that it should always be received with caution, and that it is weak and even "dangerous" evidence. (17 Cyc. 806-809.) In the case of *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529, the supreme court of California said: "Admissions are generally regarded as weak evidence for the proof of a fact, and are never conclusive of the fact stated, or of the inference to be drawn therefrom, and our statute requires the jury to be instructed on all proper occasions 'that the evidence of the oral admissions of a party ought to be viewed with caution.' " The Revised Codes provide that evidence of the oral admissions of a party is to be viewed with caution. (Sec. 8082, subd. 4.) An alleged oral admission is of no weight if the opposite party proves the fact to be otherwise. (16 Cyc. 1043-1045.)

The contract in the present case is very similar to contracts to pay a reward for information given which "shall lead to the apprehension and conviction" of a person guilty of or charged with some crime. In such a case, as was held by the supreme court of New York: "It is entirely clear that in order to entitle any person to the reward offered he must give such information as shall lead to both apprehension and conviction. * * * Both are conditions precedent." (*Fitch & Jones v. Snedaker*, 38 N. Y. 248, 97 Am. Dec. 791; Keener's Cases on Contracts, 45.) In the case at bar if the agreement was that Murray should pay "if the conditions were as stated," and "that the information was valuable," and "that he would pay if the information was satisfactory," all of these conditions precedent must be alleged and established by plaintiff before he can recover. There is a vast distinction between "satisfactory" and "valuable." "Satisfactory" refers to the mental condition of defendant and not what a court or jury might consider "satisfactory." (*Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *Stutz v. Loyd-Hanna Co.*, 131 Pa. 267, 18 Atl. 875; *Singerly v. Thayer*, 108 Pa. 291, 56 Am. St. Rep. 207, 2 Atl. 230; *Haney-Campbell v. Preston Creamery*, 119 Iowa, 188, 93 N. W. 297; *Baltimore & Ohio Ry. v. Brydon*, 65 Md. 198, 611, 57 Am. Rep. 318, 3 Atl. 306, 9 Atl. 126; *Wood Machine Co. v. Smith*, 50 Mich. 565, 45 Am. Rep. 62, 15 N. W. 906.)

The defendant sought to prove the declarations made by himself at the time he examined the vein with the witness Daum; this evidence tended to show the improbability of defendant entering into such a contract, and besides was a part of the *res gestae*. (Rev. Codes, sec. 7867; 34 Cyc. 1642; *Russell v. Frisbie*, 19 Conn. 205; *Stirling v. Buckingham*, 46 Conn. 461.) The conduct of the parties toward each other during that entire time is a part of the transaction. (*Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742-748; *Trull v. True*, 33 Me. 367.) When the making of an alleged contract is directly put in issue, all of the surrounding circumstances which may be considered part of the *res gestae* are admissible in evidence. (9 Cyc. 765.) Matters incidental to the main fact and the circumstances,

facts and "declarations which grow out of the main fact" are parts of the *res gestae* and admissible in evidence. (34 Cyc. 1642.) What defendant did or said at the time he visited the mine was not hearsay, but was a part of the transaction itself. "The *res gestae* of a transaction is what is done during the progress of it or so nearly upon the actual occurrence as fairly to be treated as contemporaneous with it." (*Hall v. State*, 48 Ga. 607; *Territory v. Clayton*, 8 Mont. 1, 19 Pac. 293.) They may extend over a long period of time if the transaction be of a continuing character. (*McGowen v. McGowen*, 52 Tex. 657; *Territory v. Clayton, supra*.)

In behalf of Respondent, *Messrs. Maury & Templeman, Mr. M. J. Cavanaugh, and Mr. J. A. Poore*, submitted a brief; oral argument by *Messrs. Templeman and Cavanaugh*.

Unless defendant was prevented from having a fair trial, an alleged variance will not warrant a new trial. (*Butterworth v. Teale*, 54 Wash. 14, 102 Pac. 768; *Olson v. Snake River*, 22 Wash. 139, 60 Pac. 156; *Ernst v. Fox*, 26 Wash. 526, 67 Pac. 258; *Johnson v. Gary*, 18 Idaho, 623, 111 Pac. 855; *Kuhn v. McKay*, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205; *Meldrum v. Kenefick*, 15 S. D. 370, 89 N. W. 863.) "A variance between the pleadings and the proof is not material where the case was contested on the proper proof." (*Burt v. Gotzian*, 102 Fed. 937, 43 C. C. A. 59; *A. B. Smith Co. v. Jones*, 75 Miss. 325, 22 South. 802; *Bedtkey v. Bedtkey*, 15 S. D. 310, 89 N. W. 479; *Ellison v. Dunlap* (Ky.), 78 S. W. 155; *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069; *Patterson v. Missouri etc. Ry. Co.*, 24 Okl. 747, 104 Pac. 31; *Antonelle v. Kennedy etc.*, 140 Cal. 309, 73 Pac. 966; *Quackenbusch v. Sawyer*, 54 Cal. 439; *Pogue v. Ball*, 4 Cal. App. 406, 88 Pac. 376; *M. E. Church v. Seitz*, 74 Cal. 297, 15 Pac. 839.)

After two findings by juries the same way on a question of fact, the verdict will not be disturbed because the weight of the evidence seems to the court to be against such findings. (*Lewis v. Equitable Mtg. Co.*, 99 Ga. 336, 25 S. E. 728; *Dempsey v. City of Rome*, 99 Ga. 192, 27 S. E. 668; *Thornton v. Abbott*, 105 Ga. 846, 32

S. E. 603; *Dethrage v. City of Rome*, 125 Ga. 802, 54 S. E. 654.) Where a trial is had and a verdict given for defendant, a new trial had and second verdict for defendant, on motion for third trial the court will give greater weight to verdict (*Atwood Lumber Co. v. Watkins*, 94 Minn. 464, 103 N. W. 332; *Lacs v. Breweries*, 107 App. Div. 250, 95 N. Y. Supp. 25), as this is peculiarly the province of a jury. (*Fox v. Oakland*, 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25; *Perry v. Lynch*, 10 Colo. App. 549, 52 Pac. 219.) A verdict on conflicting evidence will not be disturbed. (*Lehman v. Knapp*, 33 Mont. 133, 82 Pac. 798; *Layng v. Mt. Shasta Min. Spring Co.*, 135 Cal. 141, 67 Pac. 48.) Although the plaintiff told different stories as to how the accident happened, the question was for the jury. (*Joyce v. Am. Pap. Co.*, 184 Mass. 230, 68 N. E. 213; *Hansen v. Haley*, 11 Idaho, 278, 81 Pac. 935.)

The appellant contends that the contract was a conditional one, in which the precedent condition was that the information should be valuable, and that this condition was not proved or complied with. If there were any conditions inserted at the first meeting of the parties, such as that the information should be valuable or satisfactory, or be paid for if he found the conditions as McCrimmon stated, these conditions were inserted by Murray for his own benefit, and when at the second meeting he agreed to pay for the information received unconditionally, he waived all of such conditions, as he might justly and legally do. If so, we contend when Murray made the unconditional promise to pay McCrimmon, at the second meeting, he then and there waived all conditions, if there were any uncomplied with; the contract was consummated; the minds of the parties met; they parted with the complete understanding that as soon as the mine was sold the ten per cent would be paid.

Subsequent acts and declarations of the parties to a contract tending to show their construction of the contract may be shown to explain its meaning. Murray construed the contract as valuable and satisfactory to him, and the condition near enough at least as they had been represented to him, when he made the unconditional promise at the second meeting to pay McCrimmon.

(*Lewiston & A. R. Co. v. Grand Trunk*, 97 Me. 261, 54 Atl. 750; *Laclede Con. Co. v. T. J. Moss Co.*, 185 Mo. 25, 84 S. W. 76; *Kopper v. Fulton*, 71 Vt. 211, 44 Atl. 92; *Evansville & B. Co. v. Dunn*, 17 Ind. 604.)

There is no doubt but the giving of the information by McCrimmon was a valuable consideration for any promise Murray might make. "If a person possesses information which he is not bound legally to disclose, he may make it the subject of a valid sale, and the imparting of it will be a valuable consideration for a promise." (6 Am. & Eng. Ency. of Law, 2d ed., p. 721; *Green v. Brooks*, 81 Cal. 328, 22 Pac. 849; *Lucas v. Pico*, 55 Cal. 126; *Reed v. Golden*, 28 Kan. 632, 42 Am. Rep. 181.) If on account of the promise one has done something which he was not legally bound to do, it is a good consideration. (*Presbyterian Board of Missions v. Smith*, 209 Pa. 361, 58 Atl. 689.) A promise to quit using tobacco is a good consideration for a promise. (*Talbott v. Stemmons*, 11 Ky. Law Rep. 451, 12 S. W. 297.) Where a party gets all the information he voluntarily and knowingly contracts for, he will not be allowed to say that he got no consideration. (*Smock v. Pierson*, 68 Ind. 405, 34 Am. Rep. 269; *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16; *Pierce v. Pierce*, 17 Ind. App. 107, 46 N. E. 480; *First Nat. Bank v. Farmers' Nat. Bank* (Ind. App.), 82 N. E. 1013.)

The giving of an instruction that oral admissions should be viewed with caution, which contains a mere commonplace that an intelligent juror would be apt to know about and act upon in the absence of the instruction, is not regarded as harmful, or as constituting a proper ground for reversal. (*People v. Tibbs*, 143 Cal. 100, 76 Pac. 904.) Neither the giving nor refusal of such an instruction would warrant a reversal. (*People v. Wardrip*, 141 Cal. 229, 74 Pac. 744; *People v. Farrington*, 140 Cal. 656, 74 Pac. 288; *People v. Davenport*, 13 Cal. App. 632, 110 Pac. 319; see, also, *Wood v. Los Angeles Traction Co.*, 1 Cal. App. 474, 82 Pac. 547; *Brown v. Sharphouser Con. Co.*, 159 Cal. 89, 112 Pac. 874.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover the sum of \$15,000, which it is alleged the defendant promised to pay plaintiff for certain information communicated by him to the defendant. The amended complaint alleges:

"(1) That between the first day of April, A. D. 1904, and the first day of November, A. D. 1904, at the city of Butte, Silver Bow county, Montana, the plaintiff, at the special instance and request of the defendant, gave and furnished to him certain information with reference to the existence of a certain vein or lead of ore shown and disclosed within the boundaries of the Alex Scott lode claim, extended downward vertically, by a cross-cut run northerly from the West Colusa shaft at the 1200-foot level of said shaft, or what is known as the 1200-foot level thereof, for which information so furnished, the defendant promised and agreed to pay plaintiff ten per cent of the selling price of the said Alex Scott lode claim, when a sale of the same should be made, if upon investigation by the defendant, in his judgment, the said information should be satisfactory to him, the said defendant.

"(2) That thereafter the said defendant made such investigation as to the information given him by the plaintiff and the said information was satisfactory to the defendant, and at a meeting thereafter held for that purpose defendant confirmed his agreement theretofore made as above stated, and then and there promised and agreed to pay plaintiff ten per cent of the sale price of the said Alex Scott lode claim, when the same should be sold."

It is further alleged that thereafter the defendant sold the mine for the sum of \$150,000; that he has never paid to plaintiff the sum of \$15,000, ten per cent of said selling price, nor any part thereof, but has refused and still refuses to do so.

The answer admits the sale as alleged, and that the defendant has not paid to plaintiff any sum whatsoever. It denies all the other material allegations contained in the complaint. It

alleges affirmatively that plaintiff's cause of action is barred by the statute of limitations applicable to contracts and agreements not in writing, and that the contract is within the statute of frauds. The issues made upon these allegations were apparently abandoned at the trial. In any event, they are not involved in any way on this appeal. The trial resulted in a verdict and judgment for the plaintiff. From the judgment and an order denying his motion for a new trial, the defendant has appealed.

Contention is made that the evidence is insufficient to justify [1] the verdict. It would be impracticable to quote it in detail. We have studied it with that degree of care which the earnest argument made by counsel and the character of the controversy demand. We readily concede that it is not as satisfactory as it might be, but we do not feel justified in saying that it is so far without substance that the plaintiff was not entitled to have it submitted to a jury.

The plaintiff testified that as early as April 1, 1904, while working in the West Colusa mine, he had observed that a cross-cut at the 1200-foot level of the West Colusa workings, running through the Alex Scott mine belonging to the defendant, had intersected a vein in the latter; that he soon thereafter sought and obtained an interview with the defendant, and told him that he had information about the mine which might be of value to him; that the defendant then told him that he knew of the existence of the cross-cut, because it had been extended into the Alex Scott claim by his permission, but if the information proved to be valuable, or, as plaintiff stated in another place in his testimony, satisfactory, he would give him ten per cent of the selling price of the mine; that thereupon he informed the defendant of the existence of the vein; that it contained from eight to ten feet of smelting ore; that thereupon the defendant stated that the information was very valuable, and if upon examination, which he would make, he found the facts as stated he would pay as he said, upon the sale of the mine; that in a subsequent interview, within ten days or two weeks thereafter, the defendant told him that he had made the examination, that he had found

the conditions as stated by the plaintiff, and would keep good his promise theretofore made. It appears that at that time the defendant was negotiating for a sale of his property to the owner of the West Colusa mine, at the price of \$150,000, and that this fact was known to both plaintiff and defendant. These negotiations failed, but subsequently, in 1906, the defendant sold the Alex Scott mine to another company for \$150,000. The plaintiff is corroborated in his statements as to what transpired at the two interviews by one witness, who was present at both of them. The defendant denied that either of the interviews occurred. He stated, however, that he was informed of the existence of the vein while on the street, by a person who was not known to him, but who he subsequently learned was the plaintiff; that he made no promise to compensate him; that upon examination he found a vein in the cross-cut, but that it contained no ore of value. It is true the complaint alleges that the stipulation for compensation was conditional upon the information proving satisfactory to the defendant, after personal examination to ascertain if the conditions were as stated by the plaintiff; yet, if it was true that in the second interview the defendant stated that he had found the conditions as described by plaintiff and would pay him as he had promised, upon the sale of the property, this tended to show that he had found the information satisfactory. Proof that the vein carried value, and hence that the information was valuable, apart from the expression of satisfaction with its condition and the promise to pay, would not establish that it was satisfactory to defendant, within the meaning of the contract as alleged. Proof of value from any point of view would not of itself establish the satisfactory character of the information. There is a distinction in the meaning of the terms "valuable" and "satisfactory." "Valuable" means capable of being valued or estimated. "Satisfactory" means affording satisfaction, satisfying; that fully satisfies or contents. (Century Dictionary.) A thing may possess value, and yet be unsatisfactory; and, on the other hand, may be satisfactory, and yet have no value. To illustrate from the instant case: If the information had been that the running of the cross-cut through the defendant's

ground had resulted in demonstrating that it was barren it might have been considered of value, in that it would aid the defendant in determining whether, in default of the contemplated sale, he would be justified in the expenditure of the money to develop it; but it would also be an evidence to him of lack of value in the claim, and therefore, though adjacent to other valuable properties, that he could not realize from a sale of it what he anticipated. It would therefore be entirely unsatisfactory. Nevertheless, if the defendant, having upon examination found the conditions as described to him, expressed himself as satisfied and willing to pay upon the consummation of a sale, this tended to show that the agreement of the parties was as alleged, and that the condition upon which the stipulation to pay was to be binding had been fulfilled. From this point of view, the evidence tended to establish the cause of action stated, in its general scope and meaning.

Another contention is that the court erred in the theory it adopted in submitting the case to the jury. The following paragraphs of the instructions, to the theory of which the others conform, are sufficient for illustration:

"(A) You are instructed that every man who is competent to make a valid contract is free to make such contract as he will, and free to refuse to make such contract, but when once made, if the contract is legal, and is not induced by fraud or mistake, he is bound by it. So in this case, if you find from a preponderance of the evidence that the defendant promised to pay the plaintiff, in consideration of information to be given by the plaintiff to the defendant concerning a vein of ore in the Alex Scott mine, if the information were on investigation by the defendant found to be valuable, ten per cent of the sale price of the Alex Scott mine when he sold it, and that relying upon this promise by the defendant plaintiff gave him such information, such a transaction would constitute a binding contract, and if you further find on investigation by the defendant he found it to be valuable he is bound to pay the percentage, and your verdict should be for the plaintiff. You are further instructed that it is admitted by the defendant that the Alex Scott mine was,

prior to the commencement of this action, sold by him for the sum of \$150,000."

"(2) You are instructed that the plaintiff relies on a conditional or contingent contract; that is, it is claimed by him that the defendant promised, in consideration of the giving of certain information regarding certain ore bodies in the Alex Scott lode claim, that he would pay the plaintiff therefor, or upon the condition or contingency that the alleged information should prove valuable; then it is incumbent upon the plaintiff to prove by a preponderance of the evidence that the alleged information claimed by plaintiff to have been given defendant was valuable, and if you find from the evidence in this case, and from all the surrounding circumstances as shown by the evidence, that the alleged information claimed by plaintiff to have been given to the defendant was not valuable, then and in that event your verdict must be for the defendant and against the plaintiff."

In view of the issues made by the pleadings, the theory adopted by the court was erroneous. At the close of the evidence, the defendant moved the court to direct a verdict in his favor, on the ground, among others, that the evidence tended to establish a contract substantially different in its terms from that alleged, *viz.*, that defendant had agreed to pay, if the information proved to be valuable; and hence that there was a material variance between the allegations in the complaint and the proof. In overruling the motion, the court stated that, though the variance was apparent, it was immaterial, and thereupon proceeded to instruct the jury as indicated. As already pointed out, the evidence was sufficient to go to the jury upon the question whether the contract was made as alleged. If the condition of the evidence had been as the court concluded, the motion should have been sustained, for the variance would have been material, and therefore fatal to plaintiff's case, within the rule declared by the statute [2] and applied in many cases by this court, *viz.*, that if the evidence fails to establish the cause of action in its general scope there is presented, not a case of variance, but a failure of proof. (*Gilliam v. Black*, 16 Mont. 217, 40 Pac. 303; *Newell v. Nicholson*. 17 Mont. 389, 43 Pac. 180; *Spellman v.*

Rhode, 33 Mont. 21, 81 Pac. 395; *Flaherty v. Butte Electric Ry. Co.*, 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 416; *Knuckey v. Butte Electric Ry. Co.*, 41 Mont. 314, 109 Pac. 979.)

Under the issues as made, the defendant had the exclusive right to determine whether the information was satisfactory; for this term refers to the mental condition of the defendant, and not to that of the court or jury, and from the nature of the [3] case his judgment as to its character was the standard by which the court and jury should be governed. This rule is well settled. (*Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *Stutz v. Loyal Hanna C. & C. Co.*, 131 Pa. 267, 18 Atl. 875; *Baltimore & Ohio Ry. Co. v. Brydon*, 65 Md. 198, 57 Am. Rep. 318, 3 Atl. 306, 9 Atl. 126; *Haney-Campbell Co. v. Preston Creamery Assn.*, 119 Iowa, 188, 93 N. W. 297.) It is especially applicable to the purchase of articles which depend for their value largely upon individual taste and sentiment, rather than their utility from a commercial point of view. In such cases the reason or motive which prompts their rejection is not the subject of judicial inquiry. (*Haney-Campbell Co. v. Preston Creamery Assn.*, *supra*; *Zaleski v. Clark*, *supra*; *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351; 1 Mecham on Sales, sec. 666.) According to the view of some of the courts, if the article is desired only for its commercial value, the strict rule is relaxed to the extent that, though the judgment of the purchaser must be deemed conclusive, it must be exercised honestly and in good faith. (*Haney-Campbell Co. v. Preston Creamery Assn.*, *supra*; *Baltimore & Ohio Ry. Co. v. Brydon*, *supra*.) This rule seems to be entirely just, and we can see no reason why it should not apply to the case in hand, and the good or bad faith of the defendant be left to be inferred from his declarations and conduct subsequent to the examination made by him and the value of the information, dependent, of course, upon the conditions as they actually were at the time he made the examination.

The instructions took from the jury consideration of the satisfactory character of the information, and authorized them to determine the defendant's liability solely upon its value. This [4] was equivalent to the making of a contract for the parties

and determining their rights accordingly; whereas, the court's only office is to enforce the rights of parties as they have fixed them by their own agreements. If, in the opinion of the court, the evidence presented a material variance, it might have directed an amendment upon proper terms (Rev. Codes, sec. 6585); but [5] it could not submit the case to the jury upon evidence tending to establish a cause of action wholly outside the issues, without according to the defendant full opportunity to controvert it with his proof. These remarks are particularly pertinent to the conditions presented in this case; for, though some evidence was submitted as tending to show that the vein with reference to which the information was given was almost entirely barren, thus tending to establish the fact that the information was valueless, in other instances, upon objection that such evidence was immaterial, it was excluded.

Much stress is laid by counsel for plaintiff upon the fact that [6] there have been two trials of this case. This, he says, demonstrates that the defendant was not misled by the supposed variance, or prejudiced by the theory adopted by the court in instructing the jury. The complaint upon which the first trial was had alleged that payment was to be made upon condition that the information proved to be both valuable and satisfactory; whereas, under the issues as they now are, recovery rests solely upon proof of its satisfactory character within the rule stated above. The amendment of the pleadings not only relieved the plaintiff of the burden of establishing value, but was notice to defendant that the question of value was not relied on as the basis of recovery. In fact, the plaintiff offered no evidence on the subject, except the declaration of defendant at the second interview, and when objection was made by counsel to that offered by the defendant, it was excluded. A judgment obtained under these conditions cannot be permitted to stand, without violation of the rule that every person is entitled to be heard upon the issues tendered to him by his adversary. Complaint is made of other paragraphs of the instructions given, but we find no substantial error in any of them.

The court refused the request of defendant to give the following instruction: "You are instructed that the oral admissions of a party are to be viewed with caution." Though the propriety [7] of giving such an instruction in any case is lodged largely in the discretion of the trial court, and is to be given, or not, according to the court's view of the conditions presented by the evidence (Rev. Codes, sec. 8028), under the peculiar circumstances of this case, the jury should have been cautioned as to how they should view the evidence, the solution of the question whether the defendant was satisfied with the information communicated to him, and made the promise to pay, depending, as it did, entirely upon the truth of the statements of plaintiff and a single other witness, as to defendant's declarations after he made the examination of the vein exposed in the Alex Scott claim. It was error to refuse this instruction.

Complaint is made of the refusal of other instructions requested. We find no error in this behalf, because the instructions [8] given covered substantially the law embodied in those requested.

When the defendant went into the cross-cut to make the examination, he was accompanied by Mr. Daum, an engineer employed in the West Colusa mine. During the examination of Mr. Daum, he was asked to detail to the jury the acts and declarations of the defendant, indicating his estimate of the character and value of the vein, while he was engaged in making his examination of it. The evidence was excluded as hearsay. [9] This was error. The examination was one of the series of steps leading up to the consummation of the contract, without the doing of which there would have been no contract. Clearly, what the defendant said and did while engaged in it tended to show the state of mind produced by his observations, was a part of the *res gestae*, and was competent. (Rev. Codes, sec. 7867; *Territory v. Clayton*, 8 Mont. 1, 19 Pac. 293; *Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742; 34 Cyc. 1642; *Carr v. State*, 43 Ark. 99; *Stirling v. Buckingham*, 46 Conn. 461.)

It is not necessary to give special notice to other questions discussed by counsel.

The judgment and order are reversed and the cause is remanded, with directions to grant the defendant a new trial.

Reversed and remanded.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

BOWLIN LIQUOR CO., APPELLANT, v. FAUVER, RESPONDENT.

(No. 8,990.)

(Submitted June 12, 1911. Decided June 22, 1911.)

[117 Pac. 103.]

Execution—Proceedings Supplementary—Appeal and Error—Review.

Execution—Supplementary Proceedings—Scope of Relief.

1. The property of a corporation could not be taken as the property of defendant in proceedings supplemental to execution, to which the corporation was not a party.

Same—Proceedings Supplementary to Execution—Motion.

2. A motion, in proceedings supplementary to execution, that personal property in the possession of a corporation and real property in the name of defendant's wife be declared the property of defendant and subject to execution was properly denied, where the personality in possession of the corporation was not subject to the execution; the court being under no duty to separate the two parts of the motion, and to refuse one and grant the other.

Appeal and Error—Review—Parties Entitled to Allege Error.

3. In proceedings supplemental to execution, plaintiff was not aggrieved by an order, made at his request, authorizing him to bring suit against the defendant, and others to recover property in the possession of the latter.

Appeal from District Court, Park County; Frank Henry, Judge.

ACTION by the P. J. Bowlin Liquor Company against George F. Fauver. From an order in proceedings supplemental to execution, the plaintiff appeals. Affirmed.

Mr. Frank Arnold, for Appellant, submitted a brief and argued the cause orally.

The supreme court of the state of Washington in *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819, has construed a statute identical almost, word for word, with our own section 7982, Revised Codes, and it is there held: "that the testimony of a married woman that property in controversy was purchased in part by money given her by her husband was not inadmissible as a communication between the husband and wife, since the statute refers only to confidential communications induced by the marital relation, and not in regard to business transactions." (See, also, *In re Van Alstine's Estate*, 26 Utah, 193, 72 Pac. 942.) The supreme court of Iowa has also construed a statute very similar to our own, and it held that the Iowa Code providing that "Neither husband nor wife can be examined in any manner as to any communication made by one to the other while married, etc.," was intended to protect only "marital communications." (*Sexton v. Sexton*, 129 Iowa, 487, 105 N. W. 314, 2 L. R. A., n. s., 708.) To the same effect, see *Parkhurst v. Berdell*, 110 N. Y. 386, 6 Am. St. Rep. 384, 18 N. E. 123. In Michigan it is held that "when the title to the separate property of either is in litigation between husband and wife, the statute removes the common-law disability and permits either to testify to facts which lie at the foundation of the ownership of the property as fully as if the marriage relation did not exist." (*Hunt v. Eaton*, 55 Mich. 362, 21 N. W. 429.) "The transfer of a claim is not a communication within the meaning of the statute." (*Hanks v. Garder*, 59 Iowa, 179, 13 N. W. 103; *Ward v. Oliver*, 129 Mich. 300, 88 N. W. 631; *O'Brien's Petition*, 24 Wis. 547; *Spitz's Appeal*, 56 Conn. 184, 7 Am. St. Rep. 303, 14 Atl. 776; *Beyerline v. State*, 147 Ind. 125, 45 N. E. 773.)

We submit that under the great weight of the modern decisions and the freedom with which the laws of the state of Montana permit married women to contract, sue and be sued, it would be an injustice to hold that in matters of business a married woman could not be called upon to testify as to communications, not confidential, had with her husband.

Mr. Fred L. Gibson submitted a brief in behalf of Respondent, and argued the cause orally.

Section 7892, Revised Codes, is clear, and without ambiguity. It first prohibits a wife from testifying for or against her husband without his consent, and, second, it prohibits either husband or wife, during the marriage or afterward, from testifying as to any communication made by one to the other during the marriage. The first portion of the section refers to the incapacity of the husband or wife as a witness for or against each other, without the consent of the other; it relates not to the character or kind of testimony sought, but it absolutely prohibits them from testifying at all. The latter portion of the section refers to the character of testimony that may be given provided consent to the examination of the wife or husband as a witness is given by the other spouse. This section is the same as the California statute on the subject, and the courts of that state have several times construed the statute. *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303, holds that in an action against a wife to set aside a fraudulent conveyance she cannot be compelled to testify as to what decedent told her at the time of the conveyance as to his purpose in making it. The common-law rule did not extend to communications which were not in their nature confidential, but this section extends privilege to any communication. (*People v. Mullings*, 83 Cal. 138, 17 Am. St. Rep. 223, 23 Pac. 229.) The California court holds that a wife cannot be examined for or against her husband without his consent, although he is insane and incapable of giving consent. (*Falk v. Witram*, 120 Cal. 479, 65 Am. St. Rep. 184, 52 Pac. 707.) Idaho has a statute like ours in respect to husband and wife testifying for or against each other, and the court of that state passed on it in *Shields v. Ruddy*, 3 Idaho, 148, 28 Pac. 405, and held that the wife cannot testify against her husband without his consent.

The California authorities hold that it is not necessary to make the specific objection to the wife testifying (as was done in the case at bar), but that the relation of husband and wife having been shown, the law absolutely prohibits the examination of the

wife, and an objection that the testimony is incompetent, irrelevant and immaterial is sufficient. (*Humphrey v. Pope*, 1 Cal. App. 374, 82 Pac. 223.) Where the wife of the plaintiff was called as a witness and allowed to testify against her husband, over his objection, it was ground for reversal under this section. (*Fitzgerald v. Livermore* (Cal.), 13 Pac. 167.)

MR. JUSTICE SMITH delivered the opinion of the court.

On September 9, 1910, the plaintiff recovered a judgment against the defendant in Park county for the sum of \$239.76; execution was issued and returned unsatisfied, whereupon the plaintiff, through its attorney, moved the district court, on affidavit, for an order requiring the defendant to appear and answer concerning his property. He appeared in response to the order of the court and was examined. The record discloses the fact that several other witnesses were also examined. Mrs. Fauver, the defendant's wife, was sworn, but he objected to her examination on account of the fact that she was his wife. The court sustained the objection, and plaintiff saved an exception to the ruling. The court appears to have been of opinion at the close of the testimony that there was cause to believe that the Fauver Liquor Company was in possession of certain personal property which had been transferred to it by the defendant in fraud of his creditors, and that Mrs. Fauver held title to certain lots in the city of Livingston which had been conveyed to her by her husband without consideration. The record discloses that the Fauver Liquor Company is a corporation, the capital stock of which is held by various persons, among whom are some of those who were examined in this proceeding.

At the close of the testimony, the following proceedings took place:

"Mr. Arnold: Now, at this time I ask the court to order that the stock of merchandise and fixtures in the possession of the Fauver Liquor Company be subjected to execution against the defendant, George W. Fauver, on the theory that the property is the property of George W. Fauver.

"Judge Henry: Mr. Arnold, I cannot try property rights in this summary way.

"Mr. Arnold: The P. J. Bowlin Liquor Company now moves the court for an order that the personal property in the possession of the Fauver Liquor Company and real property shown to be standing in the name of S. E. Fauver be declared the property of George W. Fauver and subject to execution on the judgment in this case, and that execution issue against said property for the satisfaction of the judgment in this case, together with costs.

"Judge Henry: Let the record show the motion is denied. (To the overruling of which said motion the plaintiff duly excepted.)

"Mr. Arnold: Now, then, I ask the court for an order, in view of the overruling of the other motion, for an order granting the P. J. Bowlin Liquor Company permission to commence an action against S. E. Fauver and the Fauver Liquor Company, for the purpose of subjecting the property in their hands, or in the hands of either of them, to execution on judgment in the case at issue.

"Judge Henry: I will make the order to save time, although I will say now that I do not think it necessary. I will sign the order as to-day."

The second order is as follows: "It is ordered that the above-named plaintiff is hereby authorized, if it may be so advised, to commence suit against the Fauver Liquor Company, Sarah E. Fauver, and George Earl Fauver, or either of them, and any other person or persons, for the purpose of recovering from said persons, or either of them, any and all property belonging to or owned by defendant necessary to satisfy the judgment of the above-named plaintiff herein, together with all costs, or to set aside any and all transfers of property, real or personal, made by the defendant herein in fraud of his creditors, and do all things that may be necessary to satisfy the judgment of plaintiff herein." Plaintiff has appealed from the second order, and also from the order of the court denying his first motion.

1. The court correctly held that the property in the possession [1] of the Fauver Liquor Company could not be taken from

it in proceedings supplemental to execution, to which it was not a party. No exception was taken to the ruling of the court on this point. The second motion also included the same request, coupled with an additional prayer that the real property standing in the name of Mrs. Fauver be declared the property of her [2] husband. No duty devolved upon the court to separate the two parts of this motion, to refuse one and grant the other. It might rule on the motion as made, and if as a whole it should not have been granted, the ruling will stand. (*Yoder v. Reynolds*, 28 Mont. 183, 72 Pac. 417; *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319; *Bair v. Struck*, 29 Mont. 45, 74 Pac. 69, 63 L. R. A. 481; *Dorais v. Doll*, 33 Mont. 314, 83 Pac. 884; *Parnell v. Davenport*, 36 Mont. 571, 93 Pac. 939; *In re Fleming's Estate*, 38 Mont. 57, 98 Pac. 648; *Frederick v. Hale*, 42 Mont. 153, 112 Pac. 70; 28 Cyc. 17.)

2. Plaintiff was not aggrieved by the second order, made at its [3] request. (*Chicago etc. Ry. Co. v. White*, 36 Mont. 437, 93 Pac. 350.)

Both orders are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

WERTZ, APPELLANT, v. LAMB ET AL., RESPONDENTS.

(No. 2,965.)

(Submitted June 9, 1911. Decided June 22, 1911.)

[117 Pac. 89.]

Mechanics' Liens—Foreclosure—Personal Judgment, When—Variance—Estoppel—Notice of Lien—Sufficiency—Complaint—Supreme Court—Reversal—Final Judgment—When Improper.

Mechanics' Liens—Relief—Personal Judgment, When.

1. Though plaintiff in an action to foreclose a mechanic's lien fails to establish the lien, he may, if his complaint states a cause of action for money due, have a personal judgment in the same action against the person liable for the material furnished or work or labor done.

Same—Variance—Admissions—Estoppel.

2. Where two defendants in an action to foreclose a mechanic's lien alleged affirmatively in their counterclaim that they had employed plaintiff to do the work described in his complaint, thus admitting that the contract was made by both, they were bound by the position assumed in their pleading and therefore estopped to claim that there was a fatal variance between the allegation of the complaint that the contract was made with both defendants, and his proof which showed an agreement with one of them only.

Trial—Joint Motions—Effect of Error as to One Party.

3. A party defendant who joins with his codefendants in a motion for nonsuit on a ground which the latter were estopped to assert must abide by the consequences of a reversal of the judgment because of error in granting the motion as to them.

Variance—When Immaterial.

4. If plaintiff's proof follows substantially the allegations of his complaint, a slight, technical variance is immaterial.

Mechanics' Liens—Notice—Sufficiency.

5. Under the rule that it is sufficient if the statute giving the right to a mechanic's lien be complied with substantially by the lien claimant, a notice of lien which stated that a certain sum was due the lienor "after allowing just credits and offsets," instead of using the words of the statute (Rev. Codes, sec. 7291), i. e., "after allowing all credits," held sufficient.

Same—Form—Statute—Substantial Compliance Sufficient.

6. A mechanic's lien was not void merely because the paper was in form an affidavit, with an itemized statement attached, instead of consisting of a statement of the account and a description of the property, followed by an affidavit. The method pursued was in substantial compliance with the requirements of section 7291, Revised Codes, and therefore sufficient.

Same—Introduction of Lien in Evidence—When Unnecessary.

7. A party is required to prove only matters in issue; hence where defendants admitted that plaintiff had perfected and filed "the alleged lien mentioned in plaintiff's complaint," the paper was before the court, and it was therefore not necessary to formally introduce it in evidence.

Same—Complaint—Reference to Copy of Lien Attached to—Sufficiency.

8. Where a mechanic's lien is itself sufficient, a reference to a copy of it as attached to, and made a part of the complaint, meets the requirement that plaintiff in an action to foreclose such a lien must allege that he has complied with the provisions of section 7291, Revised Codes.

Same—Complaint—Sufficiency.

9. The allegation in plaintiff's complaint that he completed his work on August 7, 1909, and filed his lien on August 14th of the same year, was itself sufficient to show that the lien was filed within ninety days after the work was done.

Actions—Policy of Law.

10. It is not the policy of the law to require two actions to be prosecuted where one will afford the same relief.

Mechanics' Liens—Foreclosure—Nature of Proceeding—Supreme Court—Final Judgment—When Improper.

11. The procedure for the foreclosure of a mechanic's lien being neither strictly at law nor in equity, but a blending of both, the supreme court on appeal in such a cause may not enter a judgment finally disposing of it, under *State ex rel. La France Copper Co. v. District Court*, 40 Mont. 206, 105 Pac. 721, or section 6253, Revised Codes, where certain issues of fact raised by the pleadings were never fully tried in the district court.

Appeal from District Court, Gallatin County; Sydney Fox, a Judge of the Thirteenth Judicial District, presiding.

SUIT by C. F. Wertz against W. W. Lamb and others to establish a mechanic's lien. From a judgment of nonsuit and an order denying a new trial, plaintiff appeals. Reversed and remanded.

Messrs. Hartman & Hartman, and Mr. F. H. Mehlberg, submitted a brief in behalf of Appellant. Mr. Walter Hartman argued the cause orally.

Mr. B. B. Law, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover \$157.70 and costs, and to establish and foreclose a mechanic's lien. The complaint alleges that in June, 1909, the plaintiff entered into a contract with the defendants W. W. Lamb and Roama M. Lamb, by the terms of which he agreed to furnish materials and do work for which the defendants Lamb agreed to pay him certain prices aggregating \$157.70; that plaintiff fully performed his part of the contract, completing the work on August 7, 1909; that defendants have failed and refused to pay him any sum whatever; and that on August 14, 1909, he filed for record his claim for a lien. A copy of the lien is attached to and made a part of the complaint by reference. The complaint also contains a description of the property sought to be charged, and it is alleged that, while the defendant McDonald has some interest in the property, the real owners are the defendants W. W. Lamb and Roama M. Lamb. A joint answer was filed by the defendants, which admits the ownership of the property to be in the defendants Lamb, and admits the filing of plaintiff's lien on August 14, 1909. There is an affirmative defense by all of the defendants and a counterclaim by defendants W. W. and Roama M. Lamb. The

cause was tried to the court without a jury. At the conclusion of plaintiff's case, the defendants by a joint motion moved for a nonsuit, specifying several different grounds. The motion was sustained and a judgment rendered and entered that plaintiff take nothing, and that defendants recover their costs. From that judgment and an order denying his motion for a new trial, the plaintiff appealed.

1. Upon the assumption that the lien itself is invalid, the judgment is nevertheless erroneous; for the plaintiff was *prima facie* entitled to a personal judgment against W. W. Lamb and Roama M. Lamb, if his complaint states a cause of action for money due, and the proof sustained it. In *Western Plumbing Co. v. Fried*, 33 Mont. 7, 114 Am. St. Rep. 799, 81 Pac. 394, we reviewed the former decisions of this court, and held that, even though the plaintiff fails to establish his lien, he may still have a personal judgment *in the same action* against the person liable for the material furnished or work or labor done. The complaint in this instance clearly states facts sufficient to constitute a cause of action for money due, and there is not any contention made that it does not; but it is insisted that there is a fatal variance between the allegations of the complaint and the proof, in these two particulars: (1) Plaintiff "alleged a contract with W. W. Lamb and Roama M. Lamb, and submitted his proof showing only an agreement with W. W. Lamb." (2) Plaintiff "alleged a contract showing an agreement to do a good ordinary job, and his testimony shows that he agreed to do a good job."

In their counterclaim the defendants W. W. Lamb and Roama M. Lamb allege affirmatively that they employed plaintiff to do the work described in the complaint, and, having thus admitted [2] that the contract was made by both, they cannot now be heard to say that it was not, or that there is a material variance between the plaintiff's pleading and the proof in this respect. The defendants W. W. Lamb and Roama M. Lamb are bound by the position which they assumed in their pleading; and [3] defendant McDonald, having joined with them in the motion for nonsuit, will suffer with them, if the order was erro-

neous as to any of them. (*Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994.)

The plaintiff alleges that he was employed to do "a good, ordinary job." The evidence tends to show that he was to do an "ordinary job," or "a good job," or "ordinary, just a good job." Section 6585, Revised Codes, provides: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." We do not think there is a court in the land which would hold [4] that the slight, technical variance above is material. The proof follows the pleading substantially, and this appears to be all that is required. (*Robinson v. Helena Light & Ry. Co.*, 38 Mont. 222, 99 Pac. 837; *Yancey v. Northern Pacific Ry. Co.*, 42 Mont. 342, 112 Pac. 533; *Barrett-Hicks Co. v. Glas*, 14 Cal. App. 289, 111 Pac. 760.) The plaintiff having shown *prima facie* that he is entitled to a personal judgment in this action, the judgment denying him any relief whatever is erroneous and must be reversed.

2. The lien which is attached to the complaint does not follow the exact terms of the statute. Section 7291, Revised Codes, provides that the lien claimant must file with the county clerk "a just and true account of the amount due him, after allowing all credits," etc. The notice of lien in this instance states: "That there is due and owing to said C. F. Wertz from W. W. Lamb and Roama M. Lamb, husband and wife, of Bozeman, Montana, after allowing just credits and offsets, the sum of one hundred and fifty-seven and 70/100 (157.70) dollars." It [5] will be observed that the word "all" before the word "credits" in the statute is omitted in this lien notice, and the word "just" inserted in lieu thereof. The right to a lien is given by statute, and the statute must be complied with substantially in order that the lien may be created. (*McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 428.) Our present Code provision is substantially the same as section 6, Chapter 40, page 510, of the Laws of 1871-72, and in *Black v. Appolonio*, 1 Mont.

342, this court in construing that section said: "It appears to us that all our statute requires is that a person wishing to avail himself of the benefits of it should honestly state his account"; and this has been accepted as a correct interpretation ever since. (*Western Iron Works v. Montana P. & P. Co.*, 30 Mont. 550, 77 Pac. 413; *Mills v. Olsen*, 43 Mont. 29, 115 Pac. 33.)

As disclosed by the remarks made at the time the nonsuit was granted, the trial judge apparently entertained the idea that the lien notice must have attached to it a verification, in form similar to that required for pleadings. In this instance the [6] entire lien is in form an affidavit, with an itemized statement attached. Section 7291 above provides that the lien shall be "verified by affidavit." The word "verified" means to confirm by oath. (Anderson's Law Dictionary.) "An affidavit is a written declaration under oath." (Rev. Codes, sec. 7988.) In *Western Plumbing Co. v. Fried*, above, this court said: "The statute provides that the lien is made up of, first, the account; second, the description of the property; and, third, the affidavit." But this language was employed in speaking of matters of substance, and not of form. In *Bethell v. Chicago Lumber Co.*, 39 Kan. 230, 17 Pac. 813, the statute considered provided: "Any person claiming a lien as aforesaid, shall file in the office of the clerk of the district court of the county in which the land is situated, a statement setting forth the amount claimed, * * * verified by affidavit." And the court said: "The statement constituting the contract and the lien were all included in the affidavit; and the plaintiff in error contends that because of this fact there was no lien. It does not to us seem material whether or not the facts alleged and set out, which, if true, entitled the claimant to a lien, are set out in a statement by themselves, and an affidavit attached thereto, or whether all these facts are embraced in the affidavit itself." Substantially the same doctrine is announced in Boisot on Mechanics' Liens, sec. 450; Rockel on Mechanics' Liens, sec. 81; Bender-Moss on Law of Mechanics' Liens, sec. 410; *Kezartee v. Marks & Co.*, 15 Or. 529, 16 Pac. 407; *Parke & Lacy Co. v. Inter Nos O. & D. Co.*, 147 Cal. 490, 82 Pac. 51; *Turner v. St. John*, 8 N. D. 245, 78 N.

W. 340. The lien must comply substantially with the requirements of the statute; but it is not necessary that the exact words of the statute should be used. Certainty to a common intent is sufficient. (27 Cyc. 152, 153.)

Plaintiff's lien is made up of an account and a description of the property, contained in a paper which is itself an affidavit, and, since our statute does not require that any particular form be observed, we think it is a sufficient compliance with, and meets fully the demands of, the Code as determined in *Western Plumbing Co. v. Fried*, above.

3. Objection is made by respondent that the lien was not [7] introduced in evidence. A copy of the lien was attached to the complaint and by reference made a part of it. The answer admits that, "on or about the fourteenth day of August, 1909, the plaintiff perfected and filed the alleged lien mentioned in plaintiff's complaint upon the building and land therein described." The lien was therefore before the court, and it was not necessary that it be separately introduced in evidence. A party is required to prove only matters in issue. There was not any issue made by the pleadings in this case which the lien, if introduced, would have tended to prove.

4. In *McGlaufin v. Wormser*, above, this court held that the plaintiff, in an action to foreclose a mechanic's lien, must allege [8] and prove that he has complied with the requirements of the Code (sec. 7291, above; Code Civ. Proc. 1895, sec. 2130). In the present instance the complaint alleges: "That on the fourteenth day of August, 1909, the plaintiff, for the purpose of securing and perfecting a lien for the moneys due him as aforesaid, under said contract upon the building and land hereinbefore described under the provisions of the laws of the state of Montana, filed for record in the office of the county clerk and recorder of Gallatin county, Montana, his claim for the amount so due him, duly verified as required by law, a copy of which lien is hereto attached and marked, 'Exhibit B,' and the same is made a part of this amended complaint." If the lien is sufficient, a reference to it in the complaint to which it is attached is likewise sufficient for the purpose of showing compliance with the statu-

tory provisions. (27 Cyc. 387, and note; *Matthiesen v. Arata*, 32 Or. 342, 67 Am. St. Rep. 535, 50 Pac. 1015.)

5. The complaint alleges that the plaintiff completed his work [9] on or about August 7, 1909, and that his lien was filed on August 14, 1909. This is a sufficient allegation that the lien was filed within ninety days after the materials were furnished and the work done. (*Rust-Owen Lumber Co. v. Fitch*, 3 S. D. 213, 52 N. W. 879; 27 Cyc. 369.)

6. Counsel for respondents in his brief says: "We therefore respectfully submit that the judgment of the district court should be affirmed, and that the plaintiff should be permitted to proceed against the defendants for a personal judgment, if he has any right of action at all." But it is impossible for the plaintiff to proceed at all in this action, if the judgment be affirmed, for he is confronted by the judgment, which recites that he is not entitled to any relief whatever. If he is entitled to a personal judgment, he is entitled to it *in this action*, not in some other action which he might commence. It is never the policy of [10] the law to require two actions to be prosecuted where one will afford the same relief; and even if plaintiff commenced an action, he might be met with this judgment, pleaded in bar of his right to recover.

7. Counsel for appellant urge that this court should direct the [11] foreclosure of plaintiff's lien, citing the principle announced by this court in actions at law (*State ex rel. La France Copper Co. v. District Court*, 40 Mont. 206, 105 Pac. 721; *Gregory v. Chicago etc. Ry. Co.*, 42 Mont. 551, 113 Pac. 1123), and in suits in equity (*Short v. Estey*, 33 Mont. 261, 83 Pac. 479). The Code declares that in equity cases this court shall, on appeal, determine the controversy, "unless for good cause a new trial or the taking of further evidence in the court below be ordered." (Revised Codes, sec. 6253.) In actions at law, where plaintiff should have been nonsuited or a directed verdict for defendant should have been ordered, and the proper motion was made and denied, this court will generally direct final disposition of the cause. (*State ex rel. La France Copper Co. v. District Court*, above.) The present case does not fall within

either rule, and the circumstances do not warrant the application of either rule. The procedure for the foreclosure of a claim secured by a mechanic's lien, under our Code, is *sui generis*; it is neither strictly at law nor in equity, but it is a blending of both. (*Mochon v. Sullivan*, 1 Mont. 470.) In so far as the entry of a personal judgment upon the failure of the lien is authorized, the procedure is at law; while the foreclosure of the lien is governed by the rules of equity. Much confusion would be avoided in actions of this character if the question of indebtedness was first tried as an ordinary action at law, and, if anything is found to be due to the lien claimant, then proceed as in equity.

The pleadings in this action raise an issue as to whether there is in fact anything due to the plaintiff, and also an issue as to whether defendants Lamb are entitled to recover on their counterclaim. Neither of these issues has ever been fully tried.

The order granting the nonsuit and the judgment denying plaintiff any relief were entered erroneously, and for these errors the judgment and order denying a new trial are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

FOTHERINGILL, APPELLANT, v. WASHOE COPPER CO. ET AL., RESPONDENTS.

(No. 2,946.)

(Submitted June 8, 1911. Decided June 22, 1911.)

[117 Pac. 86.]

Personal Injuries—Master and Servant—Assumption of Risk—Evidence—Sufficiency.

Personal Injuries—Master and Servant—Assumption of Risk.

1. A servant assumes all the usual and ordinary risks attendant upon his employment, not including risks arising from negligence of the master, and he assumes the latter as well if he knows of the defects

from which they arise and appreciates the dangers which flow from such defects.

Same—Assumption of Risk—Knowledge by Servant.

2. Where an experienced miner agreed to take the coal from a mine, defendant to do the timbering, and, by the method of timbering adopted, the timbers were brought up within about four feet of the coal, and because of the nature of the roof between the timbers and the coal the danger from falling rock was serious, and plaintiff knew this and commented on it, and knew the means and feasibility of another method of timbering by "forepoling" the space between the other timbers and the coal, and urged defendant to do this, but continued to work, without promise on defendant's part that different methods would be adopted, there was an assumption of risk.

Same—Assumption of Risk—Nature of Defense.

3. The defense of assumption of risk is not founded in contract, and may be interposed against a servant, not because he agreed, but because it is a part of the law which can only be abrogated by the legislature.

Same—Evidence—Sufficiency.

4. Evidence held to show that the master did not hold out assurance that a different method of timbering a mine would be adopted, relieving the servant of assumption of risk.

Appeal from District Court, Carbon County; Sydney Fox, Judge.

ACTION by R. Fotheringill against the Washoe Copper Company and another. From a judgment for defendants and an order denying him a new trial, plaintiff appeals. Affirmed.

Messrs. Walsh & Nolan submitted a brief in behalf of Appellant. *Mr. T. J. Walsh* argued the cause orally.

The general doctrine of assumption of risk as it involves risks arising from the negligence of the master himself, one who multiplies the dangers of hazardous occupations by the reckless manner in which he conducts his business, is the subject of the severest criticism by enlightened modern law-writers. (See 1 Labatt on Master and Servant, 65; *Richmond etc. Ry. Co. v. Norment*, 84 Va. 167, 10 Am. St. Rep. 827, 4 S. E. 211.) Hence it is not surprising that the judicial mind has occasionally exhibited a disposition to mitigate its harshness and to increase the burden of establishing the defense involving it.

As the rule is commonly stated it is to the effect that the servant assumes all the usual and ordinary risks attendant upon his employment, not including risks arising from the negligence of the master, and that he assumes the latter as well, if he knows of

the defects from which they arise and appreciates the dangers which flow from such defects. In the development of this branch of the law, knowledge of a defect was originally held sufficient to bar a recovery and the servant was held to know of defects which he could have discovered by the exercise of reasonable diligence. But it was justly held, after a time, that knowledge of a defect, unless it was accompanied by an appreciation of the danger arising from it, ought not to preclude recovery by the servant. (*Cook v. St. Paul etc. Ry. Co.*, 34 Minn. 45, 24 N. W. 311.)

Then it was pointed out that the servant ought not to be held under any obligation to make any kind of a search to ascertain whether the master has or has not fulfilled his duty, and that an instruction which relieves the master from liability if the servant could have discovered the defect by the exercise of reasonable diligence is erroneous. (*Choctaw v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96.) Of course, if a defect is open and obvious the servant must be deemed to have known of it.

As the doctrine is subjected to judicial analysis, another feature of it, long accepted without question, is being held untenable, namely, that when it appears that the servant knew of the defect and appreciated the peril, he is to be deemed as a matter of law to have assumed the risk. Just why the servant should be conclusively held impliedly to have taken the risk, instead of the master, or why either should be deemed to have assumed it as a matter of law, is the question to which the minds of judges not willing to accept formulas simply because they are old are being addressed.

Suppose that one of defendant's men, becoming alarmed at the conditions, calls the manager into the drift and shows him the evidences of danger, in consequence of which he assumes for his company the risk of injury to the employee. Unquestionably the employee would not assume the risk under such conditions. He would be entitled to recover though he knew of the defect and appreciated the danger. (1 *Labatt on Master and Servant*, 379.) It is assumed, of course, that the danger was not so imminent and obvious as that no prudent man would subject him-

self to any such risk. In that case the servant would be guilty of contributory negligence and probably the special contract in form entered into would be void.

On the other hand, imagine the employee discovering the defect and calling the attention of the master to it, and the latter saying, "Well, I think your fears are groundless. Anyway, I shall do nothing to make the place any more secure. You may either continue at work and take the risk or quit, as you please." In that case the servant, whether he expressly declares that he will take the risk or returns to his work upon such an unequivocal declaration, without comment, must of course be held to have accepted the terms proposed. Either his declaration or his act would establish conclusively that he accepted the risk.

But now we reach the case where neither says anything. Each knows the conditions. Each appreciates or ought to appreciate the danger. But nothing whatever is said. Let it be kept in mind that the danger arises from neglect of the master, from omission to do something he ought to do to preserve the lives of his employees. Why should it be assumed in such a case that his servants in effect said to him, "We are working in a dangerous place. We know it. But we feel that if we complain you will refuse to make the repairs needed and we prefer to take the chances rather than quit!" Why should that be assumed rather than that he said, "You are working in a dangerous place; you know it and I know it. It is dangerous because I have omitted to do something which I should have done. But if you continue working, I will assume all risk of your being injured by reason of my failure to take the precautions we recognize I have failed to take." Why is it not, whenever there is not a perfectly unequivocal agreement between the parties as to which one is to take the risk, a question for the jury to say which one actually did? Such is the unquestioned rule in England to-day. (See 1 Labatt on Master and Servant, 376.)

While undoubtedly innumerable cases may be found in which knowledge of the defect and appreciation of the danger have been declared to bar recovery, it is obvious that the trend of judicial thought is away from this indefensible position to the

only logical stand: that taken by the house of lords in *Smith v. Baker*, [1891] App. Cas. 325, referred to by Mr. Labatt.

The supreme court of North Carolina, speaking of a remark of Lord Lindley in *Yarmouth v. France*, 19 Q. B. D. 647, in which the rule of *Smith v. Baker* was reaffirmed, said: "This has the weight of practical common sense, no matter from what court it comes." (*Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611, per Clark, J.) The supreme court of Arkansas declares the English doctrine to be "logically sound" (*Choctaw O. & G. R. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A., n. s., 837, 7 Ann. Cas. 430), and it was commended by the supreme court of Massachusetts in *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366, while *Smith v. Baker* was cited in support of the conclusion arrived at by that eminent court in *Wagner v. Boston El. Ry. Co.*, 188 Mass. 437, 74 N. E. 919, and in *Barrett v. New England T. & T. Co.*, 201 Mass. 117, 87 N. E. 565.

The very gist of the doctrine of the English cases was expressed in the opinion in the last-cited case in these words: "In order to constitute an assumption of risk, it must appear not only that the person who is alleged to have assumed it knew of it but also that he appreciated and voluntarily assumed it." Note the requirements: Not only must it appear that he knew and appreciated the risk, but also that he assumed it. (See, also, *Jellow v. Fore River S. Co.*, 201 Mass. 464, 87 N. E. 906; Dresser's Employer's Liability, sec. 114; 1 Shearman & Redfield on Negligence, 211; *Hamilton v. Mining Co.*, 108 Mo. 364, 18 S. W. 977; *Francis v. Kansas City etc. Ry. Co.*, 127 Mo. 658, 30 S. W. 129, 28 S. W. 842; *Northern Pac. Ry. Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; *O'Melia v. Kansas City etc. R. R. Co.*, 115 Mo. 205, 21 S. W. 503.)

While some of the cases above referred to relate to the risk attendant upon the use of defective appliances and working with incompetent fellow-servants, the same rule is applied in cases involving the law of a safe place. (*Mahaney v. St. Louis etc. Ry. Co.*, 108 Mo. 191, 18 S. W. 895.) The doctrine of these cases has become the settled law of the state of Missouri. (*Dodge v. M. C. & C. Co.*, 115 Mo. App. 501, 91 S. W. 1007;

Robertson v. Hammond Pack, Co., 115 Mo. App. 520, 91 S. W. 161.) The last-mentioned case is closely analogous to the one at bar, and fully justifies a reversal of the judgment here appealed from. The doctrine of these cases was followed and approved by the supreme court of Illinois in *Hartrich v. Hawes*, 202 Ill. 334, 67 N. E. 13. (See, also, *Graham v. Newburg Orrel Coal & Coke Co.*, 38 W. Va. 273, 18 S. E. 586.) Minnesota has lately come in line also in support of the more logical doctrine. (*Rase v. Minneapolis etc. Ry. Co.*, 107 Minn. 260, 120 N. W. 360, 21 L. R. A., n. s., 138.)

Without regard, however, to the conclusion that may be reached as to the soundness of the views heretofore in this brief exploited, there is perfect unanimity in the decisions to the effect that the appellant had a right to rely upon the assurance given him by Good, that the roof was safe without the forepoles and that he would attend to whatever timbering was necessary. The primary duty of the appellant was obedience, and he was not expected nor permitted to set up his judgment or opinion against the direction of the master. (*Harrison v. D. & R. G.*, 7 Utah, 523, 27 Pac. 728.) Moreover, he was entitled to rely on the supposedly superior knowledge of his master. (*Shortel v. City*, 104 Mo. 114, 24 Am. St. Rep. 317, and note, 16 S. W. 397.)

In behalf of Respondents, *Messrs. C. F. Kelley, L. O. Evans, and D. Gay Stivers* submitted a brief. *Mr. Stivers* argued the cause orally.

The facts alleged in the complaint fairly support the conclusion that appellant assumed the risks of the business in which he was employed; and if his service had been rendered extrahazardous, he must, in his complaint, aver facts showing that the dangers which augmented the risks of his services were not known to him. (*Schroder v. Montana Iron Works*, 38 Mont. 474, 100 Pac. 619; *Wood on Master and Servant*, par. 414; *Dixon v. Western Union Tel. Co.*, 68 Fed. 630; *Mad River & Lake Erie R. R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312; *Tennis Co. v. Davis* (Ind. App.), 92 N. E. 986; *Malone v. Hawley*, 46 Cal.

409; *Fortin v. Manville Co.*, 128 Fed. 642; *Brainard v. Van Dyke*, 71 Vt. 359, 45 Atl. 758; *Cleveland C. C. & St. L. Co. v. Lindsay*, 33 Ind. App. 404, 70 N. E. 283, 998; *Chicago & Bloomington Stone Co. v. Nelson*, 32 Ind. App. 355, 69 N. E. 705; *Brazil Block Coal Co. v. Young*, 117 Ind. 520, 20 N. E. 423; *Peerless Stone Co. v. Wray*, 143 Ind. 574, 42 N. E. 927.) It is true the complaint alleges that the appellant was without fault or negligence on his part; but this is insufficient to supply the want of allegation that appellant did not know of the dangerous condition. (*New Kentucky Coal Co. v. Albani*, 12 Ind. App. 497, 40 N. E. 702.)

In the case last cited it is held that where a recovery is sought for the master's neglect of his duty, with reference to safe place or appliances, knowledge of the defect by the master, and want of knowledge by the servant, must be affirmatively shown by the complaint. The servant's knowledge or want of knowledge must be specially alleged, because upon this it depends whether or not he is to be held to have assumed the risk of the defect. It is also established by the authorities that the allegation as to knowledge includes not only actual, but constructive, knowledge. (*Coal Co. v. Barth*, 5 Ind. App. 159, 31 N. E. 585; *Manufacturing Co. v. Fields*, 138 Ind. 58, 36 N. E. 529; *Chicago etc. Car Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Allen v. Augusta Factory*, 82 Ga. 76, 8 S. E. 68; *Louisville etc. Ry. Co. v. Sanford*, 117 Ind. 265, 19 N. E. 770; *Daugherty v. Midland etc.*, 23 Ind. App. 78, 53 N. E. 844; *Kentucky & I. Bridge Co. v. Eastman*, 7 Ind. App. 514, 34 N. E. 835; *Chicago & E. R. Co. v. Lee*, 17 Ind. App. 215, 46 N. E. 543.)

A servant is conclusively presumed to have assumed the ordinary risks of the employment. (Rev. Codes, sec. 5243.) This is incidental to his employment. Beyond this he does not assume any risk except by express agreement, or where the circumstances are such that he must be presumed to have done so from the fact that he continued in the employment, though the extraordinary danger was known to him, or was so obvious that he must be presumed to have had knowledge of it. (*Schroder v.*

Montana Iron Works, 38 Mont. 474, 100 Pac. 619; *Coulter v. Union Laundry Co.*, 34 Mont. 590, 87 Pac. 973; *Hollingsworth v. Davis-Daly Estates Copper Co.*, 38 Mont. 143, 99 Pac. 142.) It is also the rule that the servant, upon entering the service, assumes the risks and perils incident to the employment, so far as such risks and perils are open, apparent and discernible by a person of his age and capacity, in the exercise of reasonable care for his own safety. (*Anderson v. Northern Pacific Ry. Co.*, 34 Mont. 181, 85 Pac. 884.)

The authorities hold that the plaintiff is to be held as having assumed the ordinary risks of the business, but not any extraordinary risks, unless it appear that he was aware of such at the time of his employment, or that upon learning of their existence he continued in the employment after the lapse of a reasonable time for the defects to be remedied or removed. (*McCabe v. Montana Central Ry. Co.*, 30 Mont. 323, 76 Pac. 701; *McAndrews v. Montana Union Ry. Co.*, 15 Mont. 290, 39 Pac. 85; Labatt on Master and Servant, secs. 259, 270, 271 *et seq.*)

In the case of *Gregory v. C., M. & St. P. Ry. Co.*, 42 Mont. 551, 113 Pac. 1123, decided by the supreme court of Montana, February 12, 1911, it is laid down as a rule that while the servant may assume that the master has performed his duty fully, and that he will not be exposed to any *hidden* danger, yet he assumes the risks that are open and obvious to him when they arise from the business in which he is engaged; for they are risks which he is hired to assume. (*Crown Coal & Tow Co. v. Koenig*, 119 Ill. App. 192; 1 Current Law, 10; *Gibson v. Erie Ry. Co.*, 63 N. Y. 452, 20 Am. Rep. 552; *Clarke v. Holmes*, 7 Harb. & N. 937.)

Appellant and his fellow-servant Batten were contract pick-miners; they were not ordered into this place by the superintendent, and if they did not want to work there, they could have abandoned their contract. In other words, appellant freely accepted the contract, went to work in this place with full knowledge of all of the conditions, and of what was necessary to obviate the danger, knowing full well what had been and what had not been done to protect the place; that he himself, two days previous had fired off a blast which had shattered and shaken

the coal and roof; and we contend that his actions constituted negligence for which these respondents are not responsible, even though it might be found that respondents were negligent in the discharge of the duties which they owed to him. (20 Am. & Eng. Ency. of Law, 145; *Martin v. Baltimore & O. Ry. Co.*, 41 Fed. 125; Labatt on Master and Servant, sec. 334; *Atchison, T. & S. F. Ry. Co. v. Tindall*, 57 Kan. 719, 48 Pac. 12; *Coyle v. Pittsburg etc. Ry. Co.*, 155 Ind. 429, 58 N. E. 546.) If plaintiff was guilty of any negligence, however slight, he cannot recover. (*Rydell v. Greenhut & Co.*, 140 App. Div. 926, 125 N. Y. Supp. 838.)

The case before the court falls within the doctrine announced in a long line of decisions, that where the danger of the work is obvious and known to the servant (especially where he is of mature years and average experience), he assumes the risk whether the master has assured him that the work is safe or has told him that he would not repair or do anything further to make it safe. (*Anderson v. Akeley Lumber Co.*, 47 Minn. 128, 49 N. W. 664; *Fort Worth Iron Works v. Stokes*, 31 Tex. Civ. App. 218, 76 S. W. 231; *Weigreffe v. Daw*, 40 Ill. App. 53; *Showalter v. Fairbanks Co.*, 88 Wis. 376, 60 N. W. 257; *Toomey v. Eureka Iron & Steel Works*, 89 Mich. 249, 50 N. W. 850.) If the servant undertakes or continues in the performance of work, the danger of which he fully comprehends, the fact that he undertakes it unwillingly, and for fear of losing his employment, will not relieve him of the assumption of the risk incident thereto. (*Monson v. La France Cop. Co.* (Mont.), 114 Pac. 778.) In the light of all of the surrounding circumstances, and of his admissions on the stand, it is certain that plaintiff appreciated the danger. (*Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45; *Forquer v. Slater Brick Co.*, 37 Mont. 436, 97 Pac. 843; *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29; *O'Brien v. Corra, R. I. & P. Co.*, 40 Mont. 212, 105 Pac. 724; *Osterholm v. B. & M. Co.*, 40 Mont. 508, 107 Pac. 499; *Thurman v. Pittsburg & Mont. Copper Co.*, 41 Mont. 141, 108 Pac. 588.) He formed a judgment as to the future, and his judgment unfortunately was right.

(*Stewart v. Pittsburg & Mont. C. Co.*, 42 Mont. 200, 111 Pac. 723.)

If plaintiff intended to rely upon a promise to repair, or other assurance of safety, he should have pleaded it. (*Daugherty v. Midland Steel Co.*, 23 Ind. App. 78, 53 N. E. 844; *Car Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Harris v. Bottum*, 81 Vt. 346, 70 Atl. 560; *Missouri Pac. R. Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044; *Malm v. Thelin*, 47 Neb. 686, 66 N. W. 650; *Burns v. Windfall Mfg. Co.*, 146 Ind. 261, 45 N. E. 188; *Consolidated Coal Co. of St. Louis v. Bokamp*, 181 Ill. 9, 54 N. E. 567; *Bogenschutz v. Smith*, 84 Ky. 330, 1 S. W. 578; *Railroad Co. v. Doyle*, 49 Tex. 190; *Louisville etc. Ry. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770; *Hayden v. Manufacturing Co.*, 29 Conn. 548; *Stephenson v. Duncan*, 73 Wis. 404, 9 Am. St. Rep. 806, 41 N. W. 337.)

MR. JUSTICE SMITH delivered the opinion of the court.

Plaintiff commenced this action in the district court of Carbon county to recover damages alleged to have been sustained by reason of the failure of the defendant company to sufficiently timber an entry in a coal mine in which he was working as its employee. A rock fell upon him from the roof of the entry and injured him. It appears from his testimony that he and three other miners had been mining coal by the day and doing such timbering as they were ordered to do. The defendant Good had full charge of the mine. Plaintiff was a man about thirty-two years of age, who had mined coal for twenty years. Sometime in February, 1909, he and his three companions agreed with Good to take out the coal by contract. He then said to Good: "How would it be to give us figures on the timbering?" Good replied: "Never you mind about the timbering; we will take care of the timbers. You dig the coal out, and we will attend to the rest." Plaintiff testified: "The only agreement we came to in relation to the timbering was that they were to do it. I agreed to do the work at the schedule price. I went to work under that arrangement, until the eleventh day when I got hurt. The company

men timbered up behind us. We had nothing to do with the timbering, and didn't get tools for that. That ground was a limestone formation and quite a number of pot-holes in it. Pot-holes sometimes are perfectly round and the small end up; the big part will be down even with the surface of the coal. In the progress of our work, as we were running an entry along there, rock had been falling all the way from those pot-holes from the time we started the coal away from the slope. Sometimes it would come down pretty close behind us. We could never tell anything about when it was coming down; always had to keep sounding it and feeling it, as we had to be very cautious with it. It was continuously falling all along the slope from the time the coal started in the slope even to the time I met with the accident. The stuff that comes from the pot-holes, some of it is rock, and some of it is sulphur balls, and other a little coal intermixed with the different substances. When the timbers were put in, these pot-holes dropped on top of them, when they weren't lagged up. They would settle on these timbers, but the fall would be stopped where the timbers were installed. We never get a set of timbers up within four feet of the face, I dare say—that is to say, the last set of timbers would be a distance of four feet from the breast, or more; there was nothing at all to support the roof between this last set of timbers and the breast. There was more or less danger, in working in the breast, of one of these pot-holes dropping down on us. I spoke to Mr. Good about it, had different conversations with him, while we were working in this specified entry. When he came, I says, 'Tom, don't you think it would be better if they would use forepoles on these timbers to protect us in the face?' I can illustrate what forepoles are. They generally would put lagging on the slabs that would run from the center of one set of timbers to the center of the other; then I suggested that he go to work and put forepoles on—that is, extending the end of the timbers. I have been familiar with that system of timbering in different places. It is made use of in bad ground in any place where it is liable to come down during the time the men are at work; supposed to be put there for their protection. When I asked Mr. Good suggest-

ing the method of protecting ourselves, he said he would see to the timbers, or it wasn't necessary; that is all we ever got out of him—never got any forepoles in at all. The morning of March 22d I went to work; went in as usual and felt the place to see how it sounded, and sounded the roof; pulled down what coal was necessary off the face. I felt everything, sounded everything. I took my pick and started to work on the face. I put my hand up against the roof, sounded the roof; it sounded good, like all pot-holes do. It was as smooth as a table here; couldn't tell whether there was anything there that would come down or not. After I started to work, the pot-holes came down and caught me at the time I was engaged in digging coal in the breast. It fell from the face halfway over to the set of timbers. It was four feet eight or ten inches from the last set of timbers to the breast. I believe it was five feet from one set of timbers on the other side, I would not be right positive. I have mined a long time. I know how to take coal out of an entry. I understood digging coal. I cannot answer as to whether I know as much about taking this coal out as Mr. Good, because I don't know his ability. I suppose I am as well acquainted as anybody else with the same mining experience digging coal out of an entry. I have had twenty years' experience in looking out for the roof, protecting myself in entries with timbers. I always did protect myself. I consider myself qualified by my experience to do so. This last set of timbers did not meet with my approval. I knew it right along. I stated the fact to Mr. Good. It wasn't blocked as it should have been on top, or forepoles put in, as I stated. In those two respects it was imperfect. I knew it right along on Saturday, and Monday morning (the 22d) when I went to work. I talked with Good about the timbering at different times. We had sounded the roof there, that is how we came to tell Mr. Good it was bad. The entry was timbered from the face to within four feet eight inches of where I was hurt. The Saturday before I got hurt there was a rock fell through and struck back behind and hit one of the timbermen. We were supposed to sound our roof, which we done, ahead of this last set of timbers, to find out whether the ground was safe to work

in. We sounded the roof whenever we thought it was necessary. Lots of times we didn't think it needed sounding, but we sounded it merely to protect ourselves. In regard to protecting ourselves, we were supposed to take out the coal and sound the roof; that was our duty, and the company was supposed to do the timbering. There was no other agreement made at all. There is no miner living that can tell the condition of pot-holes. If we found a place there that sounded drummy and bad we had to wait until the company came and put in a set of timbers. On the Monday morning while I was working there was no room for a set of timbers on one side; these sets are all put up square. I knew from the time we started that this place where we were working ahead of the last set was more than ordinarily dangerous, from the time the coal was taken from the slope on in, it was more or less dangerous. I certainly understand coal mining is a dangerous occupation, and I realized my place was more than ordinarily dangerous. I appreciated the existence of that danger. I knew this place I was working in, ahead of these timbers, should be protected more than it had been. I put in the last blast there before the accident; my partner and I. I understood my working place was the space of the entry, ahead of the timbers. On the morning of the 22d of March when I was hurt I was telling Dave Batten, my partner, that they should put that forepoles on and fix the place. I told him that it would be better if he went to work and put these forepoles on; it would accomplish more protecting, in that nature of a place. I had realized all the way through that there should have been pole lagging extending over it. I told the timbermen different times that they should operate the system for that kind of ground I have already mentioned. I never thought that the way they put in the timbers was right when I started. The feature about this work that made it more than ordinarily dangerous was the nature of the ground; the limestone nature of that ground over there, more or less pot-holes in it. If I hadn't worked there, after I found that the ground was more dangerous than ordinary, after having these talks with Good, I would have

had to get out; it was one or the other, get out or work there. We were digging the coal out preparing a place for the timbers. Where this rock fell there was no room ahead for a full set of timbers." The record shows that the plaintiff here offered to prove that having asked the superintendent Good "whether pole lagging (?), that it was not necessary, he continued at work, feeling that the judgment of Good as to the safety of the place and the sufficiency of the timbering was rather to be relied upon than his own, and subordinated his judgment to that of his superior." The court sustained an objection to the offer.

Batten testified: "Pot-hole ground is very treacherous ground. I knew it was there because we had plenty of them coming down on us as we were doing the work. I heard Fotheringill asking Mr. Good about that—the roof was pretty bad, and he ought to forepole it. Mr. Good said he thought the ground didn't need forepoling. I knew the roof was dangerous. Fotheringill and I had examined the roof just before the accident, and I told him to look out for the roof, over the side of the entry, where he was working, as it looked unsafe to me, but he thought it was all right."

When the plaintiff rested his case the defendants moved for a nonsuit on several grounds, two of which were as follows:

"(10) For the reason that it affirmatively appears that plaintiff was an experienced miner, and well knew all of the risks and dangers incident to his employment, and voluntarily assumed all of the same, and he cannot now hold these defendants, or either of them, responsible or accountable for the injuries whereof he complains.

"(11) For the reason that it affirmatively appears that the plaintiff well knew of the dangers incidental to his employment as they existed in said entry and to the roof thereof, in the condition in which the same were at the time he went to work upon the day he was injured, and that he continued to work therein after such full knowledge, and voluntarily assumed whatever risks were incident thereto." The court sustained the motion and entered judgment for the defendants, from which judgment the plaintiff has appealed.

It is contended in the brief of the respondents that the record contains no evidence of negligence on their part. On the other hand, the appellant's counsel say: "We assume the master to be negligent." We shall not assume the master to have been negligent as a matter of law, but we may assume that the question of its negligence was one of fact for the jury, which might have been answered in the affirmative. The result is the same. Assuming that the jury might have found the company guilty of negligence in failing to forepole, was the district court justified in holding, as a matter of law, that the plaintiff assumed the risk of being injured on account of the lack of forepoling?

The learned counsel for the appellant says in his brief: "It is acknowledged at the outset that if the doctrine of assumption of risk is to be applied in all its harshness, unrestrictedly, as it has sometimes and by some courts been announced, there may be no right of recovery here." And again: "As the rule is commonly stated, it is to the effect that the servant assumes all the [1] usual and ordinary risks attendant upon his employment, not including risks arising from the negligence of the master, and that he assumes the latter as well, if he knows of the defects from which they arise and appreciates the dangers which flow from such defects." This is, indeed, the rule of law relating to assumed risks which the learned counsel assisted the district court and this court in framing and promulgating in the case of *Coulter v. Union Laundry Co.*, 34 Mont. 590, 87 Pac. 973. Here, as there, there is not any point made that the defendant company, upon being notified of the defect and danger, promised that it should be remedied. On the contrary, Good refused to forepole, saying that he did not consider it necessary. If there were anything in the record to indicate that plaintiff had any doubt on that point, many of the cases cited by the appellant might, perhaps, be in point. But there is not anything. His testimony shows that he considered forepoling necessary for some time prior to the accident. It is difficult to see how a stronger case of knowledge of defect and appreciation of danger could be made out. Fotheringill was repeatedly given to understand by [2] Good that the company proposed to continue mining with-

out the use of forepoles; and, with knowledge that his work was extraordinarily dangerous on account of a condition which he constantly had in mind, he continued his employment. Pot-holes and pot-rocks were constantly falling about him. The case cannot be distinguished from the *Coulter Case* in principle, unless it be that it is a clearer case of appreciation of danger than was disclosed in that action. As was said in *Osterholm v. Boston etc. Min. Co.*, 40 Mont. 508, 107 Pac. 499, the defense of assumption of risk is based upon an old and well-established principle of the common law, and has its foundation in the maxim, "*Volenti non fit injuria*; he who consents to an act is not injured by it." But it is argued that the maxim, being interpreted, raises the inquiry whether the servant impliedly agreed to take the risk. Not so. The consent referred to is consent to the act, not to the results flowing from the act. Having consented to the act, the law declares that he is not wronged by it, or, in other words, that he will be deemed to have assumed whatever risk may have been connected with a situation the dangerous character of which he understood and appreciated. The defense of assumption of risk is not founded in contract. It may be interposed against a [3] servant, not because he agreed that it might be, but because the law says it may. (*Osterholm v. Boston etc. Min. Co., supra.*) It is not within the power of this court to abolish or amend the defense. It is a part of the law of the land and must be abrogated, if at all, by the law-making power. In jurisdictions wherein it is held that the defense is founded in contract, the situation is altogether different. In such jurisdictions it may be, and doubtless is, proper in many cases to submit to the jury the question, Which party intended to assume the risk? But such a rule cannot be laid down by the courts in this jurisdiction. It is beyond their powers. We have, however, as we think is evidenced by the holding in the *Osterholm Case, supra*, been very careful to safeguard the rights of employees in cases where there can be any reasonable question whether they appreciated the risks arising from the physical conditions surrounding them.

As to the instant cause, we are of opinion that it falls squarely within the conditions of a supposed case set forth on pages 14

and 15 of appellant's brief, which counsel admit would not warrant the court in submitting the question to a jury. Nor can we agree that the cause should have been submitted on the theory that appellant had a right to rely upon any assurances given him by Good. His testimony shows beyond question that he had formed his own judgment as to the safety of the place. He said he knew nothing of Good's ability. There is not anything to warrant the conclusion that Good held out any assurance that the entry ahead of the last set of timbers would be forepoled. There is but one conclusion which any reasonable man can draw from [4] the testimony, and that is that Fotheringill believed that forepoles were required and Good did not; but in view of his other testimony, plaintiff would simply have stultified himself had he testified that he relied on any assurances of Good. In remaining at work he acted advisedly, in the exercise of his own experienced judgment. His testimony so discloses. There was no uncertainty as to the menace of the situation. The danger was continuous, obvious and notorious, and he fully appreciated it. He relied upon his ability and experience for protection as he had done in the past.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. BARRETT, APPELLANT.

(No. 2,994.)

(Submitted September 19, 1911. Decided September 27, 1911.)

[117 Pac. 895.]

Criminal Law—Burglary—Evidence—Cross-examination—Extent—Harmless Error—Trial—Objections, When Too Late—County Attorneys—Misconduct—Alibi—Rebuttal.

Criminal Law—Extent of Proper Cross-examination.

1. Cross-examination may extend not only to all matters stated in the witness' original examination, but to all others, either directly or indirectly connected with them, which tend to enlighten the jury upon the question at issue.

Same—Trial—Objections—When Too Late.

2. An objection made to a question after it had been answered was too late to avail appellant.

Same—Cross-examination—Harmless Error.

3. Action of the court in permitting a witness for defendant, on trial for crime, to answer certain questions on cross-examination over objection, if error, held to have been harmless.

Same—Trial—County Attorneys—What not Misconduct.

4. The mere asking of questions of defendant's witnesses, objections to which were sustained, did not constitute such misconduct on the part of the prosecuting attorney as to warrant the granting of a new trial, where the record failed to disclose that he thereafter persisted in so doing knowing that the questions were improper.

Same—Curing Error.

5. If error was properly predicable upon the mere asking of the questions referred to in paragraph 4, above, it was cured by the court's admonition to the jury to disregard them.

Same—Defenses—Alibi—Proper Rebuttal.

6. Defendant and his witnesses having testified, in support of an *alibi* relied upon by him as a defense, that he was at a certain place the entire evening on which the alleged crime was committed, it was proper rebuttal for the state to show that he was seen elsewhere on the same evening.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

JAMES BARRETT was convicted of burglary, and appeals from the judgment and an order denying him a new trial.

Cause submitted on briefs of counsel.

Mr. J. H. Duffy, for Appellant.

Mr. Albert J. Galen, and Mr. J. A. Poore, Assistant Attorney General, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

James Barrett was convicted of burglary and appeals from the judgment and from an order denying his motion for a new trial. The specifications of error relate to the admission of evidence and the alleged misconduct of the prosecuting officers.

1. Complaint is made of certain questions asked the defendant and his witnesses on cross-examination. It would not serve any useful purpose to treat these specifications in detail. The evidence sought to be elicited by the questions to which the objections [1] were made was well within the rule of cross-examination as defined in *State v. Howard*, 30 Mont. 518, 77 Pac. 50, and *State v. Rodgers*, 40 Mont. 248, 106 Pac. 3.

2. Mrs. Louis Eakley, a witness for the defendant, was asked [2] a question on cross-examination. After she answered, an objection was made to the question, but the objection came too late. (*Frederick v. Hale*, 42 Mont. 153, 112 Pac. 70, and cases cited.)

3. Louis Eakley, a witness for the defendant, was asked on cross-examination why he ordered the defendant from his home sometime prior to the date upon which the alleged crime was committed, and again asked if he had had any misunderstanding with his wife as to the testimony he should give upon the trial of this case. It is not always possible for the trial judge to determine from a given question whether the evidence solicited is or is not material. The witness answered the first question [3] that he had had trouble with the defendant, and the last question he answered, "No." Neither subject was pursued by the county attorney; and while in the light of the answers made, the objection to each question might have been sustained, there was not any motion made to strike out either answer, and the errors, if errors, were harmless. It seems to us impossible that any prejudice could have resulted to the defendant by reason of

the questions or answers. The rule that, "error appearing, prejudice will be presumed" has not been in effect in this state for many years.

4. To Herbert Bray, a witness for the defendant, the county attorney propounded two questions. To each an objection was made and sustained, and in each instance the trial judge admonished the jury not to give any heed to the questions asked; but notwithstanding this admonition it is now insisted that the county attorney was guilty of misconduct in asking the questions.

[4] It will not do to convict an attorney of misconduct for asking questions which the trial or appellate court may determine to be improper. It is possible, of course, for an attorney to ask questions which he must know are improper and to persist to such an extent as to constitute misconduct within the meaning of the statute (*State v. Trueman*, 34 Mont. 249, 85 Pac. 1024); but this record fails to disclose any such course of conduct on the part of the prosecuting officer in the trial of this case, while the [5] admonition of the trial court to the jury must be held to be sufficient to cure any error which might be predicated upon the mere asking of these questions.

5. The state made out its *prima facie* case and rested. The [6] defense relied upon was an *alibi*. The defendant and his witnesses maintained that the defendant was at the house of his sister, Mrs. Eakley, during the entire evening and night of November 9, the time when the crime is alleged to have been committed. The state then called a witness, Law, and asked him if he had seen the defendant on the night of November 9, and, if so, where and at what time he had seen him. The witness answered that he saw the defendant between 9:30 and 10 o'clock on the night of November 9, on Wyoming street. It is insisted that this was not rebuttal testimony but a part of the state's case in chief; but with this we do not agree. Under a plea of not guilty it was impossible for the state to anticipate what particular defense or defenses would be interposed, and the defendant and his witnesses having testified that the defendant spent the entire evening at his sister's home on North Franklin street, it was

proper rebuttal for the state to show that the defendant was seen elsewhere on the same evening. (*People v. Page*, 1 Idaho, 189; *State v. Lewis*, 69 Mo. 92; *State v. Cooper*, 83 Mo. 698; 12 Cyc. 557.)

We do not find any reversible error in the record. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

O'NEIL, EXECUTOR, RESPONDENT, *v.* O'NEIL, APPELLANT.

(No. 2,981.)

(Submitted September 18, 1911. Decided October 3, 1911.)

[117 Pac. 889.]

Estates of Deceased Persons—Gifts Causa Mortis—Definition—Burden of Proof—Certificates of Deposit—Validity of Gift—By What Law Determinable—Evidence—Sufficiency.

Estates—Recovery of Assets—Gifts—Action at Law.

1. Pleadings in an action brought by an executor to recover as assets of his testator's estate certain certificates of deposit, claimed by defendant as a gift *causa mortis*, held to have presented purely legal issues, and not such as were cognizable in a court of equity.

Gifts Causa Mortis—Essentials.

2. To render a gift *causa mortis* effective the following elements must concur: (1) It must have been made in contemplation, fear or peril of death; (2) the donor must have died of the illness or peril which he then feared or contemplated; and (3) the delivery must have been made with the intent that title should vest only in case of death.

Same—Validity—Burden of Proof.

3. The burden of proof rested upon defendant to show, *inter alia*, that the deceased delivered the certificates sought to be recovered as a part of his estate as a gift, and not merely as a deposit for safekeeping.

Same—Certificates of Deposit—Indorsement.

4. Though indorsement of the certificates by deceased was not absolutely essential to the validity of the gift to defendant, delivery of such an instrument being sufficient to transfer the equitable title, the omission of this formality was a fact to be taken into consideration in determining whether deceased intended to transfer title.

Same—Evidence—Sufficiency.

5. Evidence held sufficient to sustain the finding of the jury that delivery of the certificates of deposit, claimed by defendant as a gift *causa mortis*, was not intended by deceased as a transfer of title.

Same—Validity—How Determinable.

6. The validity of a gift *causa mortis* is determinable by the law of the place where it is made, without reference to the domicile of the donor.

Same—Law of Place—Evidence—Instructions.

7. The alleged gift having been made in the state of Minnesota, the trial court, for the purpose of ascertaining the law of that state relative to gifts *causa mortis*, admitted in evidence reported decisions of the supreme court of that state, and instructed the jury accordingly. The definition of such a gift made by the Minnesota appellate court is in conformity with the common law, embodied in section 4638, Revised Codes. *Held*, that appellant was not in a position to assert prejudicial error, either in the manner of ascertaining the law of Minnesota or in instructing the jury in accordance therewith.

Appeal from District Court, Yellowstone County; Sydney Sanner, Judge of the Seventh Judicial District, presiding.

CONSOLIDATED ACTIONS by Edward O'Neil, as executor of the estate of John O'Neil, deceased, against the First National Bank of Billings, the Yellowstone National Bank of Billings, the Thomas Cruise Savings Bank, Yegen Brothers, Bankers, and James O'Neil. From a judgment in favor of plaintiff and from an order denying him a new trial, defendant James O'Neil appeals. Affirmed.

Mr. James A. Walsh, Mr. R. E. Noyes, and Mr. J. R. Donohue submitted a brief in behalf of Appellant. *Mr. Walsh* argued the cause orally.

This is an equity case. The subject matter is the conflicting claims of the plaintiff and the defendant, as to the ownership of certain certificates of deposit. It is in the nature of a bill of discovery, as all equitable actions are, requiring the defendant to come in and declare by what right he holds certain property, setting forth injunctive rights, and to quiet title to personal property. This could only be done in an equitable action, in granting relief that was granted in the judgment in this action. (Story's Equity Jurisprudence, sec. 31; Pomeroy's Remedies and Remedial Rights, sec. 369.) Under the provisions of our Code, this court must try the case *de novo*.

The court erred in charging the jury that they were to determine the question of the sufficiency of the testimony to establish

a gift *causa mortis* from John O'Neil to James O'Neil of the certificates of deposit in question from the laws of the state of Minnesota and not from the laws of the state of Montana. There was no evidence offered of any statutory law of Minnesota. The only decisions of the court of last resort of the state of Minnesota on the question of gifts *causa mortis* are: *Allen v. Allen*, 75 Minn. 116, 74 Am. St. Rep. 442, 77 N. W. 567; *Davis v. Kuck*, 93 Minn. 262, 101 N. W. 655; *Winslow v. McHenry*, 93 Minn. 508, 106 Am. St. Rep. 448, 101 N. W. 799; *Varley v. Sims*, 100 Minn. 331, 117 Am. St. Rep. 694, 111 N. W. 269, 8 L. R. A., n. s., 828, 10 Ann. Cas. 473. These cases are the only ones decided by the supreme court of Minnesota on the question of gifts *causa mortis*. None of the cases introduced in evidence hold that the donor must die from the sickness or peril existing at the time the gift was made. A careful analysis of each case will show that in each and every decision there was but one question before the court for determination and but one question decided, and that was the sufficiency of the delivery of the subject of the gift.

We contend that it is not necessary that the donor should die of the disease from which he was suffering at the time he made the gift. It is only necessary that he does not recover from it. (*Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 26 N. E. 627, 11 L. R. A. 684.) In that case the donor was about to submit to a surgical operation. (See, also, *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Zeller v. Jordan*, 105 Cal. 143, 38 Pac. 640; *Larrabee v. Hascall*, 88 Me. 511, 51 Am. St. Rep. 440, 34 Atl. 408; *Nicholas v. Adams*, 2 Whart. (Pa.) 17; *Blazo v. Cochran*, 71 N. H. 585, 53 Atl. 1026; *Castle v. Persons*, 117 Fed. 835, 54 C. C. A. 133.) In this case the gift was made a year previous to death. (Redfield on Wills, page 99; 20 Cyc. 1235; *Gourley v. Linsenbigler*, 51 Pa. 345; *Craig v. Kittridge*, 46 N. H. 57.) A gift made by a person about to undergo a surgical operation is a valid gift *causa mortis*. (*Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267; *Stewart v. Whitemore*, 3 Cal. 213, 84 Pac. 841; Thornton on Gifts, secs. 25, 28, 29.)

For Respondent, there was a brief by *Mr. George W. Farr* and *Mr. C. C. Hurley*, and oral argument by both.

This is not an equity case, but is an action at law and one wherein the verdict of the jury, being general, will control and is final unless clearly contradictory to the evidence and to the law of the case. That this case is at law rather than in equity is supported by practically all of the authorities, only a few of which are here given. (20 Cyc. 1227, 1248; *Dunn v. German-American Bank*, 109 Mo. 90, 18 S. W. 1139; *Malone v. Doyle*, 56 Mich. 222, 23 N. W. 26; *Crue v. Caldwell*, 52 N. J. L. 215, 19 Atl. 188.) The last case, *supra*, is practically in point by reason of the fact that there is such a sharp distinction in the reports of New Jersey between actions at law and actions at equity.

The validity of a gift *causa mortis* is to be determined by the law of the place where it is made without reference to the domicile of the donor (20 Cyc. 1243)—and without regard to the law of the state where the cause of action involving the gift is tried. (*Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796; *Burt v. Kimbell*, 5 Port. (Ala.) 137; *Tarlton v. Briscoe*, 7 Bibb. (Ky.) 73.) In paragraph 4 of the reply, the plaintiff has specifically alleged the law of the state of Minnesota as declared by the highest appellate court thereof and the sufficiency of that pleading has never been questioned in any way. It was necessary for the plaintiff to prove these allegations of the reply. (*Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Am. St. Rep. 466, 28 Pac. 281, 14 L. R. A. 588.) There was no statutory law of the state of Minnesota pleaded because none exists, and the general law on the subject as established by the court of highest resort of the state was pleaded and proved in four different cases.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

John O'Neil died at Glendive, Dawson county, Montana, on September 22, 1908, at the age of sixty-eight years. He had neither wife nor children. He left a will dated August 12, 1908, designating the plaintiff, a brother, as his executor. By order

of the district court in and for Dawson county, made on March 31, 1910, the will was admitted to probate, and the plaintiff, having qualified as executor, entered upon the discharge of his duties. Prior to his death the deceased had made deposits in different amounts with the defendant banking institutions, which were evidenced by certificates payable to himself and amounting in the aggregate to about \$12,000. The deceased was a resident of the city of Helena, Montana, but the will was executed at Glendive, where he had stopped to visit the plaintiff and his family while on his way to Rochester, Minnesota, to secure special medical treatment, having for some time theretofore been in failing health. On August 20 he telegraphed to the defendant, James O'Neil, who resided at Hudson, Wisconsin, to meet him in St. Paul, Minnesota, to accompany him to Rochester. The two met in St. Paul on August 21 and proceeded at once to Rochester. They remained there together at a hotel until August 24, when James returned to his home. In the meantime the deceased was under treatment by his physician preparatory to undergoing a surgical operation which it was thought would probably aid his restoration to health. For safekeeping he put into the hands of one Fridell, the proprietor of the hotel, his watch and a wallet containing the certificates of deposit mentioned, together with other papers. On September 6 James O'Neil returned to Rochester, having been informed by the deceased by telegram that the operation would be performed within two days. On the next day, and before going to the hospital to undergo the operation, the deceased obtained the watch and wallet from Fridell and handed them to his brother. The certificates were not indorsed. The operation was performed on September 8. James remained at Rochester, spending a part of each day with the deceased at the hospital, until September 10; on that day he went to his home taking the wallet and its contents with him. He did not thereafter return to Rochester to see the deceased. After four or five days the deceased, having survived the operation though still weak from the effects of it and his illness, returned to the hotel and remained there until September 18, when he left, returning to Glendive,

the home of plaintiff, where he remained until his death. He was accompanied by a son of plaintiff whom he had summoned from Glendive by telegram to come to Rochester to attend him. Separate actions were brought by the plaintiff, as executor, against each of the banks to recover the amounts of the different deposits as assets belonging to his testator's estate. James O'Neil was made defendant in all of them. The action against the Cruse Savings Bank was originally brought in Lewis & Clark county; the others were brought in Yellowstone county, the place at which the defendant institutions, other than the Cruse Savings Bank, are doing business. The first was by agreement of the parties transferred to Yellowstone county, whereupon all of them were consolidated and tried as one. Disclaiming any interest in the deposits, the defendant banks were permitted to pay into court the amount due from them respectively. James O'Neil alone answered. As a defense he alleged, in substance, that after the execution of his will and during the month of September the deceased was suffering from a dangerous illness; that in the hope of obtaining relief he was about to undergo a surgical operation; that prior to undergoing the operation, being aware of the attendant danger and apprehensive that death might result from his illness and the operation, the deceased gave to the defendant James O'Neil the certificates of deposit held by him; that immediately thereafter the deceased submitted to the operation; that he subsequently, on September 22, died of his illness, and that the defendant, having accepted the gift of the certificates, thereby became the owner of them and the amounts due upon them. The issues made upon these allegations by the reply of the plaintiff were found by the jury by a general verdict in favor of the plaintiff. Judgment was rendered against each of the banks for the respective amounts due from them, and against James O'Neil for the costs of the actions. This defendant has appealed from the judgment and an order denying his motion for a new trial.

Some contention is made by counsel upon the question whether these actions are at law or in equity, the appellant contending that they are in equity and hence that this court should examine

the record and determine the questions of fact and law arising thereon, under the provisions of the Code applicable to such [1] cases. (Rev. Codes, sec. 6253.) We are inclined to the view that the pleadings present strictly legal issues only, and that under the rule so often stated by this court, the finding of the jury must stand if any substantial support for it is found in the evidence. But assuming that the position taken by counsel for appellant is correct and giving him the benefit of the more liberal mode of review prescribed by the statute as it has heretofore been construed and applied (*Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Pew v. Johnson*, 35 Mont. 173, 119 Am. St. Rep. 852, 88 Pac. 770; *Delmoe v. Long*, 35 Mont. 139, 88 Pac. 778), we are nevertheless of the opinion that the contention—which is the principal one made by appellant—that the evidence is insufficient to justify the finding of the jury must be overruled.

The statute defines a gift as a "transfer of personal property, made voluntarily, and without consideration." (Rev. Codes, sec. 4635.) It defines a gift *causa mortis*, or one made in view of death, as follows: "A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver." (Sec. 4638.) To constitute a gift *inter vivos*, within the statute, the donor must voluntarily deliver the subject of the gift to the donee with the present intention to vest the legal title in the donee, who must accept it. The essential elements are therefore: the delivery, the accompanying intent, and acceptance by the donee. Such a gift is made without condition, and becomes [2] at once irrevocable. A gift *causa mortis* is subject to the conditions: (1) it must be made in contemplation, fear or peril of death, (2) the donor must die of the illness or peril which he then fears or contemplates, and (3) the delivery must be made with the intent that title shall vest only in case of death. While there is some conflict in the authorities upon the question whether the title vests upon delivery, subject to be defeated by the recovery of the donor, or vests only upon the death, they uniformly agree that all these elements must concur to render the

gift effective. (*Leysen v. Davis*, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429; *Daniel v. Smith*, 64 Cal. 346, 30 Pac. 575; *Zeller v. Jordan*, 105 Cal. 143, 38 Pac. 640; *Williams v. Guile*, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366; *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 26 N. E. 627, 11 L. R. A. 684; *Allen v. Allen*, 75 Minn. 116, 74 Am. St. Rep. 442, 77 N. W. 567; *Varley v. Sims*, 100 Minn. 331, 117 Am. St. Rep. 694, 111 N. W. 269, 8 L. R. A., n. s., 828, 10 Ann. Cas. 473; *Gourley v. Linsenbigler*, 51 Pa. 345; *Blazo v. Cochrane*, 71 N. H. 585, 53 Atl. 1026; *Larrabee v. Hascall*, 88 Me. 511, 51 Am. St. Rep. 440, 34 Atl. 408; 3 Redfield on Wills, pp. 324, 326; Thornton on Gifts, sec. 25 *et seq.*; 1 Williams on Executors, 887, 20 Cyc. 1236.) Hence the statute, though in theory it makes the vestiture of title dependent upon the death of the donor, embodies the common-law definition recognized by the courts generally.

Counsel devote much of their argument to the question whether the evidence justifies the conclusion that the deceased was moved to make the gift of the certificates to his brother because, weakened as he was by his existing illness, he feared that he would die under the operation, or whether he was apprehensive that he would eventually die of his illness even though he might survive the operation. As we view the evidence, it is not of moment what his apprehension was. As appears from the instructions [3] submitted to the jury, the court proceeded upon the theory—which is correct—that the burden was upon defendant to establish his claim. This required him to show, not only that the delivery to him by deceased was induced by fear of approaching dissolution, but also that the intention was to vest title in the defendant in case death occurred as he then feared. In other words, it was a question upon the evidence whether the deceased intended the delivery of the wallet and watch as a gift or merely as a deposit for safekeeping. The solution of this question, depending as it did upon the credibility of the witnesses as to what transpired at the time the delivery was made, was exclusively within the province of the trial court. A brief reference to some of the salient points in the evidence will be sufficient to demonstrate that its conclusion ought not to be disturbed.

The defendant testified: "In the hotel we came downstairs, me and John, and me and John went to the office and he asked the hotel man to telephone for a hack and look up his bill; he was going to the hospital. So the hotel man telephoned for a hack and looked up his bill, and in a minute the hack got there; so John paid his bill and Mr. Fridell says: 'John, when you get well and so you will be able to leave the hospital I would like to have you come back and stay with us.' John says: 'I don't believe I will be able to come back.' So he says to Mr. Fridell, 'I have got some papers and a watch in your safe. Will you please give them to me?' Mr. Fridell opened the safe, unlocked, and handed the papers and watch to John, and John turns around to me—* * * Q. What did John say when— A. John said, 'James, I don't believe I will ever get well; I am afraid I am going to die. Here is some certificates of deposit and my watch, you take them and keep them and if I die they are yours. Q. How long did you remain in Rochester after the operation was performed on John? A. I stayed until September 10. Q. September 10? A. Yes, sir. The operation was performed the 8th. Q. On the 8th? A. Yes, sir. Q. Where did you then go? A. Went back to the hotel. I went up every morning; had two hours in the forenoon and three hours in the afternoon. I would go up there and sit there. Q. After you left the hotel on the 10th, where did you go? A. I went home. I was sick myself; that is why I went home; I got the dysentery and I went home. Q. Did you afterwards go back? A. I intended to go back the next Saturday; but in the meantime I got a letter from my nephew, John O'Neil." This letter conveyed to him the information that the deceased would leave St. Paul on September 18 on his way to Glendive. Though defendant's home was only eighteen miles from St. Paul he did not go to meet deceased.

Fridell testified: "John and James came down in the afternoon, and John says, 'Order me a hack and look up my bill,' and he paid his bill, \$9.50, I think it was. * * * He said, 'I hardly think I will pull through, but if I do I will be glad to

come back. Q. What else? A. He asked for his papers and watch; package of papers and watch, and I unlocked the safe and handed him his papers and watch. Q. Handed him this pocketbook? A. Yes, sir, and a watch. * * * Q. And were the certificates in this pocketbook that you had seen previously? A. Yes, sir. Q. What did John do with them, and what did he say? A. He turned to his brother— Q. What brother? A. James O'Neil, and he said, 'James, I don't believe I will ever get well. Here is some certificates and my watch; you take them and keep them, if I die they are yours.' He then felt that his Montana people—he said, 'That old stiff out in Montana has his mitt out for everything; he would not do a hand's turn without he expected money.' Q. What did James do? A. James put the certificates in his pocket. Q. When you say 'certificates' what do you mean? A. The watch and the pocketbook."

If these statements stood alone and were not impeached by direct contradiction or by circumstances, it might well be argued that the finding of the jury was contrary to the evidence, for there is nothing inherently improbable in them. But when they are weighed in the light of the circumstances as they existed, the character and disposition of the deceased, and the subsequent conduct of the defendant and his witness Fridell, the truth of them is open to serious question. John O'Neil, it appears, was very averse to contracting indebtedness and was habitually prompt in the payment of his obligations. There is some testimony that when he went to Rochester he had in his wallet several hundred dollars in currency, besides the certificates. What became of the currency it is not important now to inquire. When his nephew reached him in Rochester in response to his telegram, he was wholly without funds, and it was necessary for the nephew to obtain them from home to pay the hotel bill and railroad fare. The hospital and surgeon's bills were left unpaid. If James O'Neil's story is true, he accepted as a gift from his brother all the funds he had to bear his expenses and after a day or two returned to his home, leaving his brother in the hospital wholly destitute. He omitted even to thank his brother for his generosity. He did not return, though the evidence shows that about

the time the deceased left Rochester on his return to Glendive accompanied by his nephew, he sent to deceased a money order for five dollars. Why he did this the evidence does not disclose. Aside from this attention he seems not to have cared what became of his brother. He was present at the burial at Glendive. On the next day the will was opened and read in the presence of plaintiff and the defendant. The defendant expressed dissatisfaction when he ascertained that under its provisions the son of plaintiff received a larger share of the estate than was given to him and his two sisters. He immediately announced his intention to contest the will. The fact that he had the certificates in his possession was mentioned, and though they were referred to as a part of the estate, and though he found fault with the valuation of the real property disposed of by the will, he did not then claim that the certificates had been given to him by his brother, nor did he thereafter, so far as the evidence discloses, claim them until a contest of the will instituted by him had been disposed of. Early in January, 1909, Mr. Hurley, one of counsel for plaintiff, visited Fridell at Rochester, Minnesota, to make inquiry concerning the certificates. In response to an inquiry as to what was said at the time the wallet and watch were delivered to the defendant, Fridell said: "The day that John O'Neil went to the hospital he asked me for the package of papers and I gave them to John and John handed them over to Jim." Answering the question whether the deceased said anything about giving the papers to his brother, he said he did not. Questioned further he said that there was nothing said at that time that led him to think that the deceased intended to make his brother a gift, but that he supposed the papers were delivered for safekeeping only. He further said that he did not hear the deceased say that he expected to die or anything to indicate that he was laboring under apprehension of death. Subsequently, in a letter to the same witness in answer to similar inquiries addressed to him, he said: "I heard him (deceased) say that they are yours to keep, or words to that effect." It appears that the telegram received by the defendant from deceased, summoning him to St. Paul, was the only information he had received

as to his brother's whereabouts for nineteen years. There is nothing in the evidence showing that the deceased had a higher regard for the defendant than for his other kinsmen. The deceased was apparently intelligent and had had considerable business experience. He was able to attend to his business affairs notwithstanding the feeble condition of his health, and was not pressed for time; yet he did not indorse the certificates though he must have known that a transfer of a certificate is usually [4] made by indorsement. While the indorsement was not absolutely essential to the validity of the gift, because a delivery of such an instrument is sufficient to transfer the equitable title (*Ridden v. Thrall, supra*; Thornton on Gifts, pp. 229, 242; 20 Cyc. 1202), the omission of this formality was a fact for consideration by the court and jury.

Taking into consideration these circumstances, together with the fact that the defendant was an interested party, and, as appears from the evidence, further that Fridell exhibited a [5] partisan interest in the result of the litigation, it cannot be said that the jury or the trial court arbitrarily disregarded their testimony or that the conclusion reached that the transaction did not amount to a gift, is unreasonable.

If it was not the intention of deceased to make a gift, then as heretofore stated, it is not of moment to inquire what was the cause of his death.

The court entertained the view that the validity of defendant's claim was to be determined according to the law of the state of Minnesota relating to gifts *causa mortis* and instructed the jury accordingly, having ascertained it from reported decisions of the supreme court of that state which were introduced in evidence by counsel for plaintiff. Error is assigned upon the action of the court in this behalf, counsel insisting that though the case is one in equity, the view of the court was fundamentally wrong because, since the gift could not become effective until the death of deceased, and since the death occurred in Montana, the validity of the gift would have to be determined by the law of this state. Counsel also insist that the court erred in admitting in evidence [6] the decisions from the state of Minnesota. The validity of a

gift *causa mortis* is determined by the law of the place where it is made, without reference to the domicile of the donor. (*Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796; *Burt v. Kimbell*, 5 Port. (Ala.) 137; *Tarlton v. Briscoe*, 7 Bibb (Ky.), 73; *Thornton on Gifts*, sec. 18; 20 Cyc. 1243.) But it is not [7] necessary to inquire whether the court's view was correct or not. The definition of a gift *causa mortis* by the Minnesota court, as stated in the instructions to the jury, is in conformity with the common law, which, as has already been pointed out, is embodied in our own statute. (*Allen v. Allen*; *Varley v. Sims, supra*.) Hence the court did not err to the prejudice of the defendant, either by pursuing the method it did in ascertaining the law of Minnesota, or in instructing the jury in accordance with it.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

EERAERT, RESPONDENT, v. EUREKA LUMBER CO., APPELLANT.

(No. 2,952.)

(Submitted September 18, 1911. Decided October 3, 1911.)

[117 Pac. 1060.]

Logging—Streams—Negligent Driving—Liability—Defenses—Independent Contractors—Special Damages—Pleading—Evidence—Inadmissibility.

Pleadings—Amendment—Evidence—Admissibility of Original Pleading.

1. Where, in an action for damages to plaintiff's land, alleged to have been occasioned by the negligence of defendant company in managing a drive of logs, the original answer contained a paragraph admitting the driving thereof, which pleading, however, was subsequently amended by alleging that the logs were driven by another under a contract with defendant, the reception in evidence of the paragraph prior to amend-

ment was harmless, the jury in the course of the trial having been fully informed as to the contract and the circumstances under which the logs were driven.

Logging—Streams—Negligent Driving—Liability—Independent Contractors.

2. The contention of defendant company that the person who had contracted to drive its logs was an independent contractor, and that, therefore, he, and not itself, was responsible for any damage caused by the logs becoming jammed and the consequent overflow of the stream, was without merit, it appearing that under the agreement the contractor was required to conduct the drive in a certain manner, defendant refusing to give him permission, during the drive, to do it in such a way as to avoid the flooding of adjacent lands.

Same—Special Damages—Pleading—Evidence—Inadmissibility.

3. Damages to plaintiff's lands, not flooded, claimed as incidental to those caused to property actually injured or destroyed by defendant's negligence, were special; they not having been pleaded, evidence that such lands had been lessened in value in a certain amount per acre, by reason of the injury to flooded land and the improvements thereon, was erroneously admitted.

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

ACTION by Adolph Eeraert against the Eureka Lumber Company. Plaintiff had judgment, and defendant appeals from an order denying it a new trial. Judgment modified.

Messrs. Noffsinger & Walschli submitted a brief in behalf of Appellant. Mr. Noffsinger argued the cause orally.

A pleading which has been superseded by an amended one is not admissible in evidence, either for or against either party to the action. (*Mecham v. McKay*, 37 Cal. 154; *Ponce v. McElvy*, 51 Cal. 222; *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 626; *Wheeler v. West*, 71 Cal. 126, 11 Pac. 871; *Osment v. McElrath*, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731; *Ralphs v. Hensler*, 114 Cal. 196, 45 Pac. 1062; *Miles v. Woodward*, 115 Cal. 108, 46 Pac. 1076, 1079; *Littlerock E. T. C. Ry. Co. v. Clark*, 58 Ark. 490, 25 S. W. 504; *Holland v. Rogers*, 33 Ark. 251; *Smith v. Davidson*, 41 Fed. 172.) This court held the rule to be that a party is bound only by the admissions in the pleadings upon which he goes to trial (*Mahoney v. Butte Hdw. Co.*, 19 Mont. 382, 48 Pac. 545); from

which it would seem to follow that, since the party is not bound by such admissions, they are not admissible in evidence.

Elements of special damage must be specially pleaded. (*Parker v. Bond*, 5 Mont. 1, 1 Pac. 209; *Root v. Railway Co.*, 20 Mont. 354, 356, 51 Pac. 155; *Watson v. Colusa-Parrot M. & S. Co.*, 31 Mont. 513, 519, 79 Pac. 14; *O'Brien v. Quinn*, 35 Mont. 441, 448, 90 Pac. 166; 31 Cyc. 109; Phillips on Code Pleading, sec. 425.) This is especially so in regard to damages growing out of permanent injury to real property. (*Chicago etc. Ry. Co. v. Emmert*, 53 Neb. 237, 68 Am. St. Rep. 602, 73 N. W. 540, 542; *Watson v. Colusa-Parrot etc. Min. Co.*, *supra*.) The case of *Chicago etc. Ry. Co. v. Emmert*, *supra*, lays down the rule that damages for permanent injury to real estate, resulting from a flood, cannot be recovered unless specially pleaded, and where evidence as to such damages is admitted over an objection, the court must presume that prejudicial error resulted to the defendant, and a new trial should be granted.

Wilburn was an independent contractor. Under his contract he engaged to undertake an independent business, furnish his own assistants, and perform the work according to the plans prescribed in the contract, answering to the defendant only for the results, at an agreed price per M for the logs delivered. This constituted him an independent contractor. (*Carter v. Berlin Mills*, 58 N. H. 52, 42 Am. Rep. 572; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Overseers v. Pelton*, 129 Mich. 31, 87 N. W. 1029; *Town of Pierrepont v. Loveless*, 72 N. Y. 211, 215; *Gay v. Roanoke Lumber Co.*, 148 N. E. 336, 62 S. E. 436; *Young v. Lumber*, 147 N. C. 26, 60 S. E. 654, 656, 16 L. R. A., n. s., 255; *Easter v. Hall*, 12 Wash. 160, 40 Pac. 728.) These cases are in point, being log-driving or log-hauling cases. (See, also, *Jensen v. Barbour*, 15 Mont. 582, 39 Pac. 906; *Poor v. Madison River Power Co.*, 38 Mont. 341, 99 Pac. 974; *State v. Hughes*, 38 Mont. 468, 100 Pac. 610; *Campbell v. Jones*, 60 Wash. 265, 110 Pac. 1083; *Hackett v. Telegraph Co.*, 80 Wis. 187, 49 N. W. 822.) Where the relation is wholly defined by written instruments, and there is no dispute as to the facts, as in the case at bar, it was the

duty of the court to find and announce as a matter of law that Wilburn was an independent contractor. (*Anderson v. Tug River Coal Co.*, 59 W. Va. 301, 53 S. E. 713; *Gay v. Roanoke Lumber Co.*, *supra*; *Young v. Lumber Co.*, *supra*; *Green v. Soule*, 145 Cal. 96, 78 Pac. 337, 339; *Pearson v. Potter Co.*, 10 Cal. App. 245, 101 Pac. 681; *Vosbeck v. Kellogg*, 78 Minn. 176, 80 N. W. 957; *Aldritt v. Gillette Herzog Mfg. Co.*, 85 Minn. 206, 89 N. W. 741.)

Wilburn being an independent contractor and prosecuting an independent employment, it follows that defendant is not liable for any damages resulting from the negligent acts or omissions of Wilburn, for the rule is well established that an employer is not liable for the negligence of an independent contractor. (*Easter v. Hall*, 12 Wash. 160, 40 Pac. 728; *Knowlton v. Hoit*, 67 N. H. 155, 30 Atl. 346; *State v. Hughes*, 38 Mont. 468, 100 Pac. 610; *Houghton v. Lumber Co.*, 152 Cal. 500, 93 Pac. 82, 14 L. R. A., n. s., 913, 14 Ann. Cas. 1159; and logging cases, cited *supra*.)

Tobacco river is navigable stream and legally subject to proper driving. (Rev. Codes, sec. 1326; Gould on Waters, 3d ed., secs. 107, 109; 25 Cyc. 1566; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 208; *Carter v. Thurston*, 58 N. H. 104, 42 Am. Rep. 584.) To be deemed navigable for this purpose, it is sufficient that the stream have sufficient capacity to float logs at regularly recurring periods and seasons during the year, even though such periods be of a duration not to exceed a few weeks. (Rev. Codes, sec. 1326; 25 Cyc. 1566; Angell on Watercourses, secs. 535, 536; *Commissioners of Burke Co. v. Lumber Co.*, 116 N. C. 731, 47 Am. St. Rep. 829, 21 S. E. 941; *Shaw v. Oswego Iron Co.*, 10 Or. 371, 45 Am. Rep. 154; *Treat v. Lord*, 42 Maine, 552, 66 Am. Dec. 298; *Diedrich v. N. W. Ry. Co.*, 42 Wis. 248, 24 Am. Rep. 399; *Falls Mfg. Co. v. Oconto River Imp. Co.*, 87 Wis. 134, 58 N. W. 257.) The river being navigable and the log-driving industry being a lawful industry, plaintiff could only recover damages which resulted from negligent driving by defendant. (*Hopkins v. Butte Commercial Co.*, 13 Mont. 223, 40 Am. St. Rep. 438,

33 Pac. 817; *Gibson v. Kelly*, 15 Mont. 417, 39 Pac. 517; 25 Cyc. 1578.)

Mr. Sidney M. Logan and *Mr. Ernest M. Child*, for Respondent, submitted a brief. *Mr. Logan* argued the cause orally.

The following courts hold the original pleading, which has been superseded by an amended pleading, competent as to admissions therein: *Alabama Midland R. Co. v. Guilford*, 114 Ga. 627, 40 S. E. 794; *Mulligan v. Railway Co.*, 36 Iowa, 181, 14 Am. Rep. 514; *Raridan v. Railway Co.*, 69 Iowa, 527, 29 N. W. 599; *Wyles v. Berry*, 116 Ky. 377, 76 S. W. 126; *Vogel v. Osborne*, 32 Minn. 167, 20 N. W. 129; *Walser v. Wear*, 141 Mo. 443, 44 S. W. 928; *Woodworth v. Thompson*, 44 Neb. 311, 62 N. W. 450; *Sayre v. Mohney*, 35 Or. 141, 56 Pac. 526; *Barrett v. Featherstone*, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245; *Kilpatrick Co. v. Box*, 13 Utah, 494, 45 Pac. 629; *Arnd v. Aylesworth*, 195 Iowa, 185, 123 N. W. 1000, 29 L. R. A., n. s., 638; also, *Boots v. Canine*, 94 Ind. 408. We believe the point has never been passed upon by this court.

Defendant's second specification of error is that plaintiff should not have been permitted to introduce evidence of the depreciation in value of the 150 acres or so of land not actually flooded, for the reason that there was no allegation of special damages to this portion of the land in the complaint. There was no error: (1) Because the evidence was admissible under allegations of general damage. "Damages which are probable and traceable to and necessarily result from an injury are termed 'general damages.'" (*North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.*, 23 Utah, 199, 63 Pac. 812; *Jutte v. Hughes*, 67 N. W. 268, cited in *Herfort v. Cramer*, 7 Colo. 483, 4 Pac. 901; *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175, 22 Pac. 266, 5 L. R. A. 498.) (2) The plaintiff's complaint contains an allegation that the effect of the injury was "to render the lands of the plaintiff untillable, unproductive and uninhabitable," and since the destruction of the bottom land had the effect, as the evidence discloses, of rendering the whole 160 less desirable as a residence and less inhabitable, it was competent to show under that allegation the depreciation in value of the land not destroyed by reason

of the fact that the whole ranch was less suitable as a place of residence. (*Peden v. Chicago R. I. Ry. Co.*, 78 Iowa, 131, 42 N. W. 625, 4 L. R. A. 401; *Wrought Iron Range Co. v. Graham*, 80 Fed. 474, 25 C. C. A. 570; *Marvin v. C. M. & St. P. Ry. Co.*, 79 Wis. 140, 47 N. W. 123, 11 L. R. A. 506; *Harvey v. Mason City & Fort Dodge Ry. Co.*, 129 Iowa, 465, 113 Am. St. Rep. 483, 105 N. W. 958, 3 L. R. A., n. s., 973.) (3) But in any event, if there was error, it was harmless. The reason for requiring the plaintiff to allege special damages is that the adverse party may know what evidence it must meet and rebut on the trial. It has suffered no harm in this case, as is shown by the fact that while the plaintiff introduced one witness as to the damage to the rest of the 160 acres, the defendant introduced the evidence of three witnesses upon this precise point.

MR. JUSTICE SMITH delivered the opinion of the court.

This action was begun to recover damages on account of the fact, as alleged in the complaint, that defendant had so carelessly and negligently driven certain logs down the Tobacco river, in Flathead county, through the lands of the plaintiff, as to damage and destroy such lands, together with certain buildings and personal property situated thereon. Plaintiff had a verdict and judgment for \$1,416. Defendant appeals from an order denying a new trial.

1. By original answer, in paragraph 5, defendant admitted driving the logs, but afterward, by amendment, alleged that they were driven by one Wilburn under a contract between them. At the trial paragraph 5 of the original answer was received in evidence, over defendant's objection. We find no reversible [1] error in this; we regard the whole matter as immaterial in view of the fact that the jury was fully informed as to the contract and the circumstances under which the logs were driven.

2. The contract provided, among other things, as follows: "Wilburn agrees to drive all logs that may be put into the Tobacco river, from a point two miles above the place now occupied by what is known as the Van Wagenen dam, to the mill now

operated by the company at Eureka. Wilburn further agrees to keep the mill supplied at all times with logs if there shall be a sufficient amount of logs in the river to do so, or to bring to the mill an amount equal to whatever is put into the river by the company's wood crew and their contractor. In case there are too many logs in the river to bring all to the mill, then the company are to accept a solid jam at mill."

It is contended that Wilburn was an independent contractor, and, therefore, that he alone, and not the defendant, was responsible for the damage caused by the logs. It appears from the testimony that the defendant company placed in the stream about 17,000,000 feet of logs and that these logs were "packed solid" in the river for a distance from eight to twelve miles above its mill. Plaintiff's property was situated about one and a half miles above the mill. The result of so crowding the river with logs was that they became jammed, and dammed up the stream in places, in consequence of which, when the jams, as the witnesses describe them, were broken, the water came down in such quantities as to cause a "big flood" and the logs were forced out of the stream over and upon the adjoining lands, including those of the plaintiff. It will be noted that the defendant company [2] had contracted with Wilburn to either bring all logs to the mill or maintain a solid jam there. When Wilburn requested of the president of the company permission to leave the channel open for a short distance in order to prevent flooding the adjacent lands, he met with a refusal. It is apparent, therefore, that it becomes immaterial to inquire whether Wilburn was technically an independent contractor; in a certain sense he was, but the damages sustained by the plaintiff were occasioned, not by any negligence on his part in managing the drive, but by reason of the negligence of the defendant in overloading the stream in order that the logs might be "driven solid"; in other words, by the manner in which the work was necessarily conducted under the contract. There is really no substantial controversy on this point in the testimony. In this view of the case, the authorities cited by the appellant are not in point, as they all relate to specific acts

of negligence on the part of independent contractors. In arriving at the foregoing conclusion we have assumed—of which assumption defendant cannot complain—that the Tobacco river is a navigable stream. We think the foregoing disposes, in effect, of all other questions raised, save one.

3. Over defendant's objection the plaintiff was allowed to testify that certain lands, incidentally described in the complaint, but not flooded, had been lessened in value in the sum of two dollars per acre, by reason of the injury to flooded land and the improvements thereon. We think the objection interposed was sufficiently specific to raise the point made by the appellant and that the testimony was erroneously received. The complaint, after describing 160 acres of land of which plaintiff is alleged to be the owner, sets forth: "That the defendant * * * caused * * * a jam of logs to pile up and form a dam, thereby interrupting and obstructing the natural flow of the waters of said stream, and causing the same to overflow its banks, and to cover and inundate and flood the lands of plaintiff herein-before described, and to carry onto and cover the same with large quantities of saw-logs, sand and rubbish and debris; to tear down, wash away, cut out, erode and destroy the natural banks of said stream on the lands of plaintiff; to tear down, uproot and wash away the fruit and ornamental trees and vegetation of plaintiff growing on said land; to wash away and destroy the habitation, barns and other buildings of plaintiff on said land; to carry off, wash away and destroy large quantities of vegetables stored on said lands, and large quantities of household goods and furniture and farming implements, machinery and personal property of plaintiff; to wash away and destroy plaintiff's wagon bridge across said stream on said land; to tear, erode, wash and cut great gullies, ravines, seams and gashes in the soil of plaintiff's land, and causing the said stream to leave its natural channel, and to cut, tear and wash a new channel across the land of plaintiff, and to render the lands of plaintiff untiltable, unproductive and uninhabitable, to destroy the private road of plaintiff across said land, and compelling plaintiff on account thereof, to build a new road at great annoyance, cost and expense." We find in the

foregoing no allegation which would tend to notify the defendant [3] that plaintiff would claim damages to lands not flooded, as incidental to those caused to property actually injured or destroyed. Plaintiff's counsel stated to the court at the time the testimony was offered, that "we would have to move away from the water." Such damages are special and should have been pleaded. (*O'Brien v. Quinn*, 35 Mont. 441, 90 Pac. 166.)

There is no necessity for a retrial of this cause unless respondent so elects. It is ordered that the order appealed from be affirmed, provided plaintiff shall, within ten days after *remittitur* received in the court below, agree to remit the sum of \$300 from the judgment, as of date of its original entry; otherwise a new trial is ordered. Appellant to pay costs.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied November 3, 1911.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
OCTOBER TERM, 1911.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH,
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

McENANEY, RESPONDENT, v. CITY OF BUTTE, APPELLANT.

(No. 2,995.)

(Submitted September 21, 1911. Decided October 5, 1911.)

[117 Pac. 893.]

Cities and Towns—Sidewalks—Personal Injuries—Ordinary Care—Liability—Notice of Defect—Complaint—Insufficiency.

Cities and Towns—Streets and Sidewalks—Notice of Defect.

1. A municipality being held only to the exercise of ordinary care to make and keep its streets in a reasonably safe condition, it is entitled, after notice, actual or constructive, of a defective condition or of the existence of an obstruction in a street imperiling the safety of persons traveling thereon, to a reasonable opportunity to act in the premises.

Same—Complaint—Notice of Defect—Essential.

2. Since the liability of a municipal corporation to respond in damages for injuries alleged to have been caused by a defective condition or an obstruction in a street imperiling the safety of persons traveling thereon, depends upon notice of the alleged unsafe condition and the failure to exercise ordinary care to remedy it, the complaint in such an action must allege facts showing notice at a sufficient interval before the injury, to give the defendant reasonable opportunity to act.

Same—Notice of Defect—Insufficiency of Complaint.

3. Complaint in an action against a city to recover damages for personal injuries alleged to have been caused by a fall upon a sidewalk

where an accumulation of ice and snow had formed a smooth, slippery and slanting surface, *held*, insufficient, under the rule declared in paragraph 2, *supra*, in that it failed to state facts from which the length of time intervening between the injury and the alleged notice of the unsafe condition in the walk could be determined.

Same—Streets—Snow and Ice—Duty to Remove.

4. The duty to keep its streets free from accumulations of ice and snow rests upon a municipality only when they imperil life or limb.

Same—Injuries—Statutory Notice—Sufficiency.

5. The notice of the injury complained of, required by section 3289, Revised Codes, to be given defendant city, signed by the plaintiff, "by C. & K., her attorneys," was *prima facie* sufficient.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by Margaret McEnaney against the city of Butte to recover damages for personal injuries caused by a fall on a sidewalk. Plaintiff had judgment, and from it and an order refusing it a new trial, defendant city appeals. Reversed.

Mr. H. Lowndes Maury, Mr. John A. Smith, Mr. Edwin M. Lamb, Mr. John R. Boarman, and Mr. N. A. Rotering, submitted a brief in behalf of Appellant. *Mr. Maury* argued the cause orally.

In the complaint, it is said that the ice and snow, formed by reason of said overflow, was a source of danger to pedestrians passing on and over said sidewalk. This allegation is clearly a conclusion of the pleader. "An allegation that the sidewalk was dangerous is a mere conclusion." (*Bretsh v. Toledo*, 1 Ohio N. P. 210.) "A petition which merely shows that the plaintiff slipped and fell upon the icy sidewalk is demurrable." (*Id.*; *Bodah v. Deer Creek*, 99 Wis. 509, 75 N. W. 75.) The case at bar does not come within the rule laid down in the case of *Storm v. City of Butte*, 35 Mont. 385. In that case the complaint alleged that the defendant city had negligently permitted snow and ice to accumulate on the sidewalk at the point where the injury occurred, to the depth of several inches, and that the ice so accumulated became uneven and rounded and had such an angle from the level of the sidewalk that a person could not walk over it without danger of falling. The complaint in the case at

bar contains no allegation like the allegation contained in the *Storm Case*. Nor does the case come within the rule laid down by the case of *Townsend v. City of Butte*, 41 Mont. 411, 109 Pac. 869. In that case the complaint showed that (a) the defendant had permitted ice and snow to accumulate on the sidewalk at the point where the injury occurred, forming a smooth, slippery and slanting surface dangerous to pedestrians; (b) the failing to remove the same after due notice, and (c) failing to place a warning or signal at the dangerous place. It will be observed that a necessary allegation according to the case last cited is an allegation to the effect that the icy obstruction existed for a sufficient length of time to give the city constructive notice, or that the city had actual notice of the said obstruction for a sufficient length of time to have enabled it to remove the same. In view of the fact that the complaint does not show how the water was carried to the sidewalk and also fails to state that the ice was there for any length of time, we submit that it is clearly insufficient and does not state a cause of action.

The evidence is insufficient to support the judgment. The plaintiff complains that there was smooth, slippery and slanting ice at the point where she fell on the East Broadway street sidewalk. The evidence, however, does not bear out this claim—there is nothing in the testimony of any of the plaintiff's witnesses that shows that the ice about which they testified was any other than level, smooth and slippery ice. "A municipality is not liable for injuries caused by a fall on level, smooth and slippery ice." (*Calder v. City of Walla Walla*, 6 Wash. 377, 33 Pac. 1054; *Henkes v. City of Minneapolis*, 42 Minn. 530, 44 N. W. 1026; *Brennan v. City of New York*, 117 App. Div. 849, 103 N. Y. Supp. 266; *McDonald v. Toledo*, 63 Fed. 60; *Aurora v. Parks*, 21 Ill. App. 459, 462; *City of Aurora v. Pulver*, 56 Ill. 270, 272; *Stanton v. Springfield*, 12 Allen (Mass.), 566; *Hutchins v. Boston*, 12 Allen (Mass.), 577.)

Where the plaintiff fell on the ice on the sidewalk in front of defendant's house, in order to recover for injuries received the plaintiff must show that the icy condition resulted from some other cause than surface water naturally flowing on it from

melted snow which had frozen on the sidewalk. (*Greenlaw v. Milliken*, 100 Me. 440, 62 Atl. 145; see, also, *Hausmann v. City of Madison*, 85 Wis. 187, 39 Am. St. Rep. 834, 55 N. W. 167, 21 L. R. A. 263, 275; *Brobury v. City of Des Moines*, 63 Iowa, 523, 50 Am. Rep. 756, 19 N. W. 340; *Wilson v. Idaho Falls*, 17 Idaho, 420, 105 Pac. 1057; *Chicago v. McDonald*, 111 Ill. App. 436; *Mueller v. Milwaukee*, 110 Wis. 623, 84 Am. St. Rep. 948, 86 N. W. 162.)

Messrs. Canning & Keating, for Respondent, submitted a brief. *Mr. Canning* argued the cause orally.

The proximate cause of the injury to the respondent was the failure of the city to remove the ice and snow, after reasonable notice of its existence in a dangerous condition, or to protect her from injury thereby by proper guards. The continuance of ice and snow in a smooth, slippery and slanting surface on a sidewalk for an unreasonable time is such a defect as renders the municipality liable. (*Townsend v. City of Butte*, 41 Mont. 411, 109 Pac. 869.) This condition is alleged in the complaint. It is alleged that this was the cause of respondent's injuries. It is alleged that the city had notice of the existing conditions. It is further alleged that the city received notice of the time and place of the injuries. A general demurrer was interposed to the complaint, and by the court overruled. No special demurrer was interposed. If appellant was desirous of discovering what caused the overflow at the point mentioned in the complaint, or in what manner it was caused, a special demurrer for uncertainty, we contend, might have aided him. The complaint was good as against a general demurrer. (*Townsend v. City of Butte, supra.*)

Where, by reason of the manner of constructing the walk or the surrounding conditions, the walk accumulates an unusual amount of snow or ice, or where the snow and ice thus allowed to remain upon the walk are not as they fall from the clouds from purely natural causes, there is like obligation upon the city to remove the obstruction (after notice either express or implied)

and liability for negligence in failure to perform that duty. (*Cook v. Milwaukee*, 24 Wis. 270, 1 Am. Rep. 183; *Collins v. Council Bluffs*, 32 Iowa, 324, 7 Am. Rep. 200; *Cosner v. Centerville*, 90 Iowa, 33, 57 N. W. 636; *Stanton v. Springfield*, 94 Mass. 566; *Pinkham v. Topsfield*, 104 Mass. 78; *Fitzgerald v. Woburn*, 109 Mass. 204; *Adams v. Chicopee*, 147 Mass. 440, 18 N. E. 231; *Hughes v. Lawrence*, 160 Mass. 474, 36 N. E. 485; *Decker v. Scranton City*, 151 Pa. 241, 31 Am. St. Rep. 757, 25 Atl. 36.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for a personal injury which it is alleged the plaintiff suffered by reason of a fall upon a sidewalk on one of the streets of defendant, at a point thereon where there was an accumulation of ice and snow, forming a smooth, slippery and slanting surface. The plaintiff had a verdict and judgment. The defendant has appealed from the judgment and an order denying its motion for a new trial.

The sufficiency of the complaint was questioned in the court below, both by general demurrer and by objection to the introduction of evidence at the opening of the trial. The action of the court in overruling the contention of defendant's counsel in this behalf is assigned as error. After reciting the capacity of the defendant, its possession and control of the streets and sidewalks, etc., the complaint alleges:

"3. That the defendant, disregarding its duty in that behalf, did negligently, carelessly and knowingly allow and permit for a long time prior to the 6th day of February, 1909, water to overflow from the adjoining and abutting property, over and across the sidewalk on the north side of said East Broadway street covering a space of more than ten (10) feet; that by reason of the said overflow of said water, over and across said sidewalk as aforesaid, ice and snow accumulated on the said sidewalk at that point, and formed a smooth, slippery and slanting surface of about ten (10) feet wide.

"4. That said overflow of said sidewalk by said water was negligently allowed to wrongfully exist and had existed with the full

knowledge of the defendant for a period of over one year; that said ice and snow formed by reason of said overflow were a source of danger to pedestrians passing on or over the said sidewalk, and during the long period of time which said ice and snow existed, said sidewalk was not protected by any guards, lights, barriers or signals of danger to notify persons traveling upon said sidewalk of the danger caused thereby; and that during all of said time said sidewalk was traveled by great numbers of people, the said sidewalk and street being one of the principal thoroughfares of the said city of Butte, and the said sidewalk was, at this particular point, used by pedestrians traveling thereon both day and night.

"5. That at and during all the times herein mentioned, the defendant had full knowledge of all the facts and matters herein alleged."

The following paragraphs allege the particulars and character of the injury, and notice to the defendant of the time and place of it, under the requirements of the statute.

Some question is made that the allegations touching the accumulation of ice and snow are insufficient to show that it was such an obstruction as to be a source of danger to persons traveling along the sidewalk; but similar allegations were considered in the case of *Townsend v. City of Butte*, 41 Mont. 410, 109 Pac. 869, and were held sufficient.

The contention upon which defendant relies chiefly is, that there is no allegation of fact showing that it was guilty of negligence in failing to remove the alleged obstruction within a reasonable time after notice of its existence. A municipal corporation [1] is held only to the exercise of ordinary care to make and keep its streets in reasonably safe condition. (*Leonard v. City of Butte*, 25 Mont. 410, 65 Pac. 423; Dillon on Municipal Corporations, 5th ed., sec. 1697; 28 Cyc. 1358.) This being the rule controlling its liability, it is entitled, after notice of a defective condition or of the existence of an obstruction in a street imperiling the safety of persons traveling thereon, to a reasonable opportunity to act in the premises. Hence, before it can be

held liable for an injury resulting from the unsafe condition, it must appear that sufficient time has elapsed, after notice, to permit it to act. (28 Cyc. 1362; Dillon on Municipal Corporations, 5th ed., sec. 1718.) The notice may be actual or constructive. The celerity of action is necessarily dependent upon the attendant circumstances in each case, *viz.*: location of the obstruction, use of the street, and the like; but mere knowledge, without any reasonable opportunity to act, does not determine liability. In this class of cases, therefore, liability depending, as it does, upon notice of the alleged unsafe condition and the failure to exercise [2] ordinary care to remedy it, it is necessary to allege facts showing notice at a sufficient interval before the injury, to give the defendant reasonable opportunity to act. In other words, the facts stated must show defendant guilty of a legal wrong in [3] failing to act with reasonable diligence. Tested by this rule, the complaint before us is insufficient. It is alleged that "at and during all the times herein mentioned, the defendant had full knowledge of all the facts and matters herein alleged." Read in connection with the preceding allegations, this can mean nothing more than that for some period of time the defendant knew of the accumulation of ice and snow and allowed it to remain without furnishing protection to pedestrians by guards, lights, barriers or danger signals. Was this period of time an hour, or a day or month? The allegation is but a conclusion which the pleader has left unaided by the statement of any specific fact to enable one to determine what the length of time was. Hence the complaint does not contain a statement of facts in ordinary and concise language (Rev. Codes, sec. 6532), and is insufficient to sustain a judgment. It is true that the length of time during which water was permitted to overflow the sidewalk is specifically stated; but even so, no additional fact is stated justifying the inference that the city, through its officers, must have anticipated that the flow would by the intervention of the weather necessarily result in the formation of a dangerous obstruction, and therefore that it was bound to know the condition of the sidewalk as it was when the accident occurred. A [4] municipality is not required under all circumstances to keep

the streets free from accumulations of ice and snow. It must do so only when they imperil life or limb.

The statutory notice served upon the city council is set out in full in the complaint. It is argued that the demurrer should have been sustained, because it appears that the notice was not given by the plaintiff or anyone in her behalf, as prescribed by the statute. (Rev. Codes, sec. 3289.) This contention is without [5] merit. The notice is signed by the plaintiff, "by Canning & Keating, her attorneys." Upon its face it purports to have been given in her behalf by the attorneys who brought the action for her. This, we think, is *prima facie* sufficient.

In view of the foregoing conclusion, it is unnecessary to notice the other errors assigned by the appellant. The judgment and order are reversed, with direction to the district court to sustain the demurrer.

Reversed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. BOGY, RESPONDENT, v. BOARD OF COUNTY
COMMISSIONERS ET AL., APPELLANTS.

(No. 3,059.)

(Submitted September 25, 1911. Decided October 9, 1911.)

[117 Pac. 1062.]

New Counties—Petition for Creation—Number of Signatures—Statutory Construction.

1. Held, that the requirement of section 2, Chapter 112, Laws of 1911 (having to do with the creation of new counties), that the petition therein provided for "shall be signed by at least one-half of the qualified electors of the proposed new county whose names appear on the official registration books" used at the last preceding general election, refers to those persons only who at the date of signing the petition were qualified electors; and that therefore defendant board of county commissioners, in arriving at the total number of electors, signatures of at least one-half of whom were

necessary to move the board to order an election, erroneously counted those whose names might properly have been canceled by the registry agent under section 476, Revised Codes, because of death, removal, etc., since the last general election.

Appeal from District Court, Lewis & Clark County; J. M. Clements, Judge.

ACTION by the state, on the relation of L. V. Bogy, to compel the board of commissioners of Chouteau county to submit the question of the creation of the new county of Blaine to the electors, under Chapter 112 of the Laws of 1911. Relator had judgment directing a writ of mandate to issue as prayed, and defendants appeal. Affirmed.

Mr. Albert J. Galen, Attorney General, and *Mr. W. S. Towner*, Assistant Attorney General, submitted a brief in behalf of Appellants. *Mr. Towner* argued the cause orally.

The respondents contend that the board of county commissioners should have eliminated from the registration list the names of 143 persons who were either dead or permanently removed from the county at the time of consideration of said petition. They argue that it is not a fair interpretation of this law to require a percentage of a list of persons, a portion of whom may have died or removed from the county. "It is within the power of the legislature to require more than the majority of the electors to petition, before an election shall be called, for the relocation of a county seat, and to define who are to be considered legal petitioners." (*State v. Board of County Commrs.*, 31 Kan. 462, 2 Pac. 562.) As to the general right of a legislature to prescribe a rule, see *Wilson v. Bartlett*, 7 Idaho, 271, 62 Pac. 417; *Roesch v. Henry*, 54 Or. 230, 103 Pac. 441; *Luce v. Fensler*, 85 Iowa, 603, 52 N. W. 517; *Williamson v. Russey*, 73 Ark. 270, 84 S. W. 229. See, also, *State ex rel. Stringfellow v. Board*, 42 Mont. 62, 111 Pac. 144. It was clearly the intention of the legislature by the Act in question to fix the number of names that must appear as signers to the petition for the division of a county. This number is fixed at not less than fifty per cent of the names on the last

registration list. It is immaterial whether this list is a correct or incorrect list of voters. It may or may not be correct as a list of voters; nevertheless it is the official list designated by the legislature which must be used by the county commissioners in determining and ascertaining the number of signers to the petition to give the board jurisdiction to act further in the matter. The assessment list or the road tax list might have been designated as it is in some states. "It is a rule, for which there is an abundance of authority, that the mere fact that a certain construction of a statute will cause inconvenience or failure of justice, will not affect the judicial determination of a case involving such a construction." (36 Cyc. 1111, and cases cited.) In support of the general proposition that the legislature has the power to define who are to be considered legal petitioners, we cite the following authorities: *State v. Board*, 31 Kan. 464, 2 Pac. 562; *Loomis v. Bailey*, 45 Iowa, 400; *Luce v. Fensler*, 85 Iowa, 596, 52 N. W. 517; *Duffees v. Sherman*, 48 Iowa, 291; *Williamson v. Russey*, 73 Ark. 270, 84 S. W. 229; *La Londe v. Board of Supervisors*, 80 Wis. 380, 49 N. W. 960; *State ex rel. Hawley v. County Board*, 88 Wis. 355, 60 N. W. 266; *State ex rel. Lewis v. Eggleston*, 34 Kan. 714, 10 Pac. 3; *State v. Barton*, 58 Kan. 709, 51 Pac. 218.

In behalf of Respondent, *Messrs. Gunn & Hall* submitted a brief. *Mr. E. M. Hall* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for *mandamus*. On May 22, 1911, there was presented to the board of commissioners of Chouteau county a petition asking for the creation of a new county, to be named Blaine, out of territory within the boundaries of Chouteau county described in the petition. The proceeding thus sought to be initiated is authorized by an Act of the last legislative assembly providing a uniform mode for the "creation, organization and classification of new counties, for locating the county seats," and for other purposes incidental and necessary to accomplish the

main purpose of the legislation. (Laws 1911, Chap. 112, p. 205.) The petition contained a statement of the facts necessary to confer jurisdiction upon the board and require it to proceed. It purported to bear the signatures of more than one-half of the qualified electors of the proposed new county whose names appeared on the official registry books used at the last preceding general election held therein, as required by the statute, and was properly verified by the affidavits of three qualified electors and taxpayers. By order of the board duly made, notice was published fixing the hearing for June 11. The number of signatures to the petition was 681. Prior to its formal presentation to the board, however, written requests for leave to withdraw their signatures were filed with the board by forty of the original signers. During the course of the hearing, which was adjourned from time to time until July 1, the board struck off the names of those who had requested to withdraw, the number of signatures being thus reduced to 641. None of the facts stated in the petition or attached affidavits were controverted by anyone. At the hearing it appeared that there were upon the official register used at the last preceding general election a total of 1,411 names. Counsel representing the petitioners introduced evidence showing that of this number many had either died or permanently removed from the county, or had registered in two different precincts. This evidence was in the form of sworn testimony of witnesses who had personal knowledge of the persons who bore the names in question, and was not controverted. At the conclusion of the hearing the board found all of the facts as stated in the petition; that all of the 641 signatures were of electors entitled to join in the petition; that of the total of 1,411 names on the register, 143 did not, because of deaths, permanent removal from the county, etc., represent qualified electors, and that, deducting these names from the list, 641 represented more than one-half of the remainder. It nevertheless held the petition insufficient and refused to proceed because it did not bear the signatures of at least one-half of the total number of 1,411. Thereupon the relator, a taxpayer and resident of the proposed county of Blaine, instituted this proceeding. The district court

was of the opinion that from the facts found by the board, and stated above, the petition was sufficient, and rendered judgment directing the writ to issue. The defendants have appealed.

Section 1 of the Act referred to defines the circumstances under which a new county may be created either out of territory within a county already existing, or out of territory included in two or more adjoining counties.

Section 2 confers the power to create the new county upon the board of commissioners of the county out of which the territory of the proposed new county is to be taken; or, if it is the purpose to include in the proposed county, territory from two or more counties, upon the board of the county from which the greatest area of territory is to be taken. The proceeding must be initiated by petition. "Such petition shall be signed by at least one-half of the qualified electors of the proposed new county, whose names appear on the official registration books used at the general election held therein last preceding the presentation of said petition to the board of county commissioners as herein provided; * * *. If territory is to be taken from more than one county, separate petitions must be presented by the electors from such portions of territory so to be taken. There must be attached to each petition the affidavits of three qualified electors and taxpayers of the territory from which it comes, verifying the genuineness of the signatures and also the truth of the statements recited. The course of procedure to be pursued by the board is indicated, and at the hearing, after notice, the board may take the petition as *prima facie* evidence of the jurisdictional facts, or it may hear evidence; or, upon proper petition by qualified electors from a definite portion of territory, may change the boundaries of the proposed county so as to exclude such portion of territory. If upon the hearing the facts are found justifying action by the board, it must by resolution make a record of them.

Section 3 then makes it incumbent upon the board to divide the designated territory into townships, road and school districts, and to designate election precincts, and thereupon to proclaim and hold an election. If upon canvassing the returns it is found

that the result is in favor of the new county, as required by section 4, the board shall by resolution declare the county organized. The election must include the selection of a county seat and the necessary county and township officers.

Sections 5 to 15, inclusive, embody provisions directing how the internal affairs of the county are to be adjusted by the newly elected officers.

From this brief *r  sum  * of the provisions of the Act, it is apparent that it was the duty of the defendant board to proceed to proclaim and hold the election, if the number of signatures to the petition was sufficient under the requirement of section 2; for, all the other jurisdictional facts having been found in favor of the petitioners, the board had no discretion but to proceed under the provisions of section 3. This is conceded by the attorney general, but he argues that it was the clear intent of the legislature, as expressed in the language, *supra*, from section 2, that the number of signatures must be at least one-half of the number of names of electors as they appear upon the registration books, without regard to the number of them which might have been canceled by the registry agent under section 467, Revised [1] Codes, because of death, removal, etc. Counsel for relator contend that the requirement refers to those qualified electors only whose names are properly on the list, and hence that the board having found that 143 of the names on the list do not represent qualified electors, it should have deducted these from the total sum. With this latter contention we agree. It is clear from the language employed that the signers of such a petition shall at the time of signing possess two qualifications, *viz.*, they must be qualified electors of the proposed new county, and their names must be found upon the registration books. Though a name is found upon the list of registered electors, it does not follow necessarily that the person who was registered under that name is therefore a qualified elector. At best, if he is living, he is only *prima facie* such, even if he retains his residence. Death or a disqualification then existing or thereafter wrought by change of residence or other cause, removes him from the class of electors. Therefore, to give significance to the expression

"qualified electors of the proposed new county," it must be understood as a limitation upon the number of those who only may be taken into account, notwithstanding the number of names appearing on the list. In other words, the number of names upon the list is not the criterion, but the number of names of those who at the date of signing the petition are qualified electors. That this is the correct view is made manifest by the duties which must be discharged by the board in determining the sufficiency of the petition. While it must be accepted as *prima facie* evidence of the truth of everything contained in it, on final consideration of it the board must hear the petitioners and any opponents and receive evidence offered to establish or controvert the facts set forth in it. It must thereupon determine the truth of all jurisdictional facts, among others, whether it "contains the genuine signatures of at least one-half of the qualified electors of the proposed new county as herein required." (Section 2.) If the facts stated, among which is the fact that the signers are qualified electors of the proposed new county, may be controverted, it may be shown that any signer is not such an elector, even though his name is on the list. Hence the petitioners may show that some of the names on the list are not those of qualified electors.

It is argued by the attorney general that this conclusion recognizes, as lodged in the board, the power to cancel from the registration books the names of deceased or disqualified electors, whereas by the statute (section 476, *supra*) it is lodged exclusively in the registry agent, to be exercised during the period of registration only. We do not agree with this. The board does not remove any name. It merely ascertains from the list the names of those who are qualified electors, in order that it may know that the petition bears the signatures of the requisite number.

A number of cases are cited by counsel in support of their respective contentions, including *State ex rel. Stringfellow v. Board of Commissioners*, 42 Mont. 62, 111 Pac. 144; but the provisions of the statutes examined in them differ materially

from those under consideration here. Hence they have not substantially aided us in reaching a conclusion.

The judgment is affirmed.

'Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

ARNOLD ET AL., RESPONDENTS, v. FRASER, APPELLANT.

(No. 2,989.)

(Submitted September 20, 1911. Decided October 9, 1911.)

[117 Pac. 1064.]

Real Property—Contracts of Sale—Default by Vendee—Complaint—Tender—Sufficiency—Mortagor and Mortgages—Tenancy—Improper Counterclaims—Oral Agreements Merged in Written Contract.

Real Property—Contracts—Cancellation—Complaint—Promissory Notes—Tender—Sufficiency.

1. In a suit to cancel a contract of sale of real property because of breaches thereof by the vendee, the complaint which alleged that the notes evidencing deferred payments were brought into court for cancellation and return to defendant, was sufficient as against the objection that tender thereof had not been made before commencement of suit.

Same—Encumbrances—Complaint—Sufficiency.

2. An allegation that the land mentioned in a contract of sale was free from encumbrances and that plaintiffs were able to convey title was unnecessary in a suit by the vendor seeking cancellation because of breaches of its provisions by the vendee.

Same—Tender—Complaint—Sufficiency.

3. Assuming (but not deciding) that it was necessary for plaintiffs to allege that they had tendered to defendant all moneys paid by him under the contract of sale, the requirement of the law that defendant shall first be placed in *statu quo*, was met by an allegation that he had the use of the premises from the date of the contract to the commencement of suit, and that the rental value of the property exceeded the amounts paid by defendant to or for the use of plaintiffs.

Same—Default of Vendee—Mortgages.

4. Held, that a contract of sale which, among other things, provided that time should be of the essence of it, that the vendors could at their option terminate it for failure on the part of the vendee to comply strictly with its terms, and that upon such termination the property involved and all payments made by the

vendee should be the property of the vendors, and the vendee should not have any action to recover, was not a mortgage.

Same—Default by Vendee—Tenancy.

5. In the absence of a provision in a contract of sale of real property, for the creation of a tenancy in case of default by the vendee, further occupancy of the premises by him will not be deemed to have been under an implied agreement permitting him to hold as tenant.

Same—Improper Counterclaims.

6. Allegations that plaintiffs orally represented to defendant that the land sold to him comprised a larger acreage than he actually received, and that having executed the contract of sale in reliance on such false representations, he was entitled to be given credit for a certain amount because of such deficiency in the quantity of land, held, not to have constituted counterclaims in a suit to cancel the contract because of defendant's failure to carry out its provisions.

Same—Oral Agreements Merged in Written Contract.

7. A written contract supersedes any oral negotiations theretofore had relative to the subject matter of it, and must be considered as containing all of its terms agreed upon at the time it was executed.

Same—Evidence—Inadmissibility.

8. Evidence to prove an alleged oral agreement subsequently superseded by a written contract is inadmissible.

Same—Improper Counterclaims.

9. That defendant, relying upon plaintiffs' false statements that the ditches upon the lands purchased by him from them were in proper condition to carry and distribute water, suffered loss by damage to his crops, and was put to expense for repairs, did not constitute counterclaims in a suit to cancel the contract of sale.

Appeal from District Court, Yellowstone County; Sydney Sanner, Judge of the Seventh Judicial District, presiding.

Messrs. Hathhorn & Brown submitted a brief in behalf of Appellant. Mr. Brown argued the cause orally.

We submit that the counterclaims set forth in the answer do arise out of the transaction set forth in plaintiff's complaint as the foundation of the plaintiff's claims, and also that they are directly connected with the subject of the action. If these counterclaims had not been stricken out and had been proven and allowed to the defendant by the jury or by the court, the defendant would not have been in default upon his contract, because enough money would have been realized by him to have made all the payments and more than the payments. That the matters alleged in the counterclaims are such as could be counter-claimed in this action, we submit this court has already decided. (*Kaufman v. Cooper*, 39 Mont. 146, 101 Pac. 969; *Erbs v. Smith*,

35 Mont. 47, 88 Pac. 568; see, also, Pomeroy's Code Remedies, 4th ed., par. 670, p. 927, and notes 1 and 2.)

There is no allegation that the notes mentioned in the contract were tendered to the defendant before this action was commenced and no demand made by the plaintiffs for the possession of the premises involved. We submit, further, that there is no allegation in the complaint that at the time the plaintiffs attempted to declare the contract, which constitutes the basis of their action, null and void, the premises mentioned in the contract were free from encumbrances, and that they were able to convey a good and sufficient title free from all encumbrances, which they were ready and willing to do. This is a necessary allegation. (*Washington & Turner v. Ogden*, 2 Black (U. S.), 456, 17 L. Ed. 203; *Tharp v. Lee*, 25 Tex. Civ. App. 439, 62 S. W. 93.) There is no offer to restore to the appellant any of the purchase money paid by him, or to place him in the same condition he was before the contract was made. In view of the fact that this is an action practically to rescind the contract, we submit that it comes within subdivision 2 of section 5065, Revised Codes. (*Cotter v. Butte etc. Smelting Co.*, 31 Mont. 129, 77 Pac. 509.)

Furthermore, we contend that the contract in question here is simply a mortgage upon the premises to secure the unpaid purchase money represented by the notes which accompanied the contract between the parties. If the contract before the court is not a security for the payment of the notes, it is difficult to state what it was given for. If the notes had been sold to anybody by the payees, they certainly would have had rights under the agreement in evidence, or if one of the notes had been sold by the vendors named in the agreement, the purchaser of that one would have had security for the payment of the note, and the contract in question would have been his security. (*Nightingale v. Barens*, 47 Wis. 389, 2 N. W. 767; *Conner v. Banks*, 18 Ala. 42, 52 Am. Dec. 209; *Keller v. Lewis*, 53 Cal. 113; *McCullis v. Cole*, 25 R. I. 156, 105 Am. St. Rep. 875, 55 Atl. 196.)

The complaint in this action seeks to enforce a forfeiture which can never be done in equity. (*Keller v. Lewis*, 53 Cal. 113.) On

the contrary, equity frequently interposes to prevent the enforcement of a forfeiture at law. (16 Cyc. 80.)

The notice to quit was not such a notice as was required in this class of cases. The appellant was a tenant at will of the appellees. (*Raynor v. Haggard*, 18 Mich. 72; *Rawson v. Babcock*, 40 Mich. 330; *Knight v. Hartman*, 81 Mich. 462, 45 N. W. 1008.) Tenancy at will is one that may be terminated at the will of either party. (*Davis v. Murphy*, 126 Mass. 143; *Hilsendegen v. Scheich*, 55 Mich. 468, 21 N. W. 894.) A person who enters and holds land under a contract to buy it is to be regarded at law as at least a tenant at will. (*Jones v. Jones*, 2 Rich. (S. C.) 542.) The notice to quit in this case was served on the sixteenth day of November, 1908; this case was commenced by filing a complaint on the twenty-fifth day of November, 1908. If the appellant was a tenant at will, as the authorities hold him to be, upon which there is no conflict, then this notice is not sufficient, and this action is brought prematurely. A tenancy at will in this state can only be terminated by a notice in writing given in the manner prescribed by the Code of Civil Procedure, requiring the tenant to remove from the premises within a period of not less than one month, to be specified in the notice. No such notice appears in the record, and is not alluded to in the complaint.

Mr. O. F. Goddard, for Respondents, submitted a brief and argued the cause orally.

The counterclaims set up in the answer are not such as are contemplated by section 6541, Revised Codes. (See *Osmers v. Furey*, 32 Mont. 593, 81 Pac. 345; *Babcock v. Maxwell*, 21 Mont. 507, 54 Pac. 943; 34 Cyc. 756; *Yorba v. Ward*, 109 Cal. 107, 38 Pac. 48, 41 Pac. 793; *Bannerot v. McClure*, 39 Colo. 472, 90 Pac. 70, 12 L. R. A., n. s., 126; *Bank v. Kidd*, 20 Minn. 234; *Lipman v. Iron Works*, 128 N. Y. 58, 27 N. E. 975; *Mattoon v. Baker*, 24 How. Pr. 329; *Dietrich v. Koch*, 35 Wis. 618.)

This is an executory contract, and may be rescinded. Courts have uniformly held that the rescission of an executory contract of sale of real estate, upon the failure of the vendee to pay the purchase price, may be made when provision for a forfeiture is

made in the contract, provided the vendor places the vendee *in statu quo*, when he elects to rescind. (*Dana v. St. Paul Investment Co.*, 42 Minn. 194, 44 N. W. 55; *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239; *Graham v. Merchant*, 43 Or. 294, 72 Pac. 1088; *Maffet v. Oregon & C. R. Co.*, 46 Or. 443, 80 Pac. 489; *Richardson v. Woodlawn Town Co.*, 5 Kan. App. 626, 47 Pac. 556; *Chambers v. Anderson*, 51 Kan. 385, 32 Pac. 1098; *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696; *Raymond v. San Gabriel Val. Land & Water Co.*, 53 Fed. 883, 4 C. C. A. 89; *Wilcoxson v. Stitt*, 65 Cal. 596, 52 Am. Rep. 310, 4 Pac. 629; *Jones v. Bowling*, 117 Mich. 288, 75 N. W. 611; *Keefe v. Fairfield*, 184 Mass. 334, 68 N. E. 342; *Boulder & B. Placer Co. v. Maxwell*, 24 Colo. 87, 48 Pac. 815; *McAdams v. Felkner*, 140 Cal. 354, 73 Pac. 1064; *Haile v. Smith*, 113 Cal. 656, 45 Pac. 872.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is a suit in equity, brought to secure a decree canceling a certain contract. Issues were joined upon the original pleadings and the cause brought to trial before the court sitting with a jury. By agreement of counsel and the approval of the court, after a portion of the evidence had been taken the jury were discharged, the parties permitted to reform their pleadings, and the cause was thereupon tried and submitted to the court. The plaintiffs filed an amended and supplemental complaint—referred to in the brief as the substituted complaint—and the defendant filed an answer thereto which contains certain admissions, certain denials and four affirmative pleas denominated “counter-claims.” From the record it appears that on May 1, 1907, the plaintiffs and the defendant entered into a contract in writing, by the terms of which the plaintiffs agreed to sell to the defendant, and the defendant agreed to purchase from the plaintiffs, certain real estate and personal property situated near Billings, Montana. The purchase price agreed upon was \$37,000, payable in six installments: \$2,000 upon the execution of the contract, and the balance, with interest, payable in five annual installments, the last payment to be made May 1, 1912, each of the

deferred payments being represented by a promissory note. In the contract the land is described by legal sectional subdivisions and by government lots. As ground for a cancellation of the contract the plaintiffs allege breaches by defendant in the following particulars: (1) The failure and refusal of defendant to pay the installment and interest due May 1, 1908; (2) failure to pay the installment and interest due May 1, 1909; (3) failure to keep the buildings insured; and (4) the failure to pay certain assessments on stock in irrigation companies. Plaintiffs allege that after breach by the defendant they gave notice of their intention to terminate the contract as required by it, and they brought into court the promissory notes for cancellation and redelivery to defendant. They allege that the defendant has had free use and enjoyment of the property during the seasons of 1907 and 1908 and received a part of the crop for the year 1909. They allege that the fair rental value of the land was \$1,500 per year, and that the defendant has had the use of the personal property, and has received in benefits from the use and occupation of the property more than he has paid to, or for the use of, plaintiffs. The answer admits that an installment of the principal and the interest were due on May 1, 1908, but there is apparently a denial that these amounts have not been paid. There is an admission that the installment and the interest due May 1, 1909, have not been paid. Upon motion of plaintiffs the court struck out the first three of the so-called counterclaims, and upon the issues joined found for the plaintiffs and entered a decree, from which decree and an order denying his motion for a new trial the defendant has appealed.

1. The first contention made is, that the complaint does not state a cause of action; that it is deficient in the following particulars: (a) It does not appear therefrom that the notes representing the deferred payments were tendered to the defendant [1] before this suit was instituted. The complaint does allege that the notes were brought into court for cancellation and return to defendant, and we think this is sufficient. (*Maloy v. Berkin*, 11 Mont. 138, 27 Pac. 442; 6 Cyc. 313.)

(b) It is said that the complaint is open to attack because it fails to allege that the land mentioned in the contract was free from encumbrances and that plaintiffs were able to convey title. [2] If this was an action to recover the purchase price or damages for a breach, such an allegation might be necessary; but in a suit to cancel the contract we are unable to understand what office such an allegation would perform. However, in paragraph 9 of the complaint, the plaintiffs allege facts sufficient to meet the rule for which appellant contends.

(c) It is further urged that the complaint is defective in failing to allege that plaintiffs have tendered to defendant the money paid by him under the contract. Upon the trial of this cause in the district court, and upon this appeal, both parties have proceeded upon the assumption that it is necessary for the complaint to contain an allegation that the plaintiffs have returned, or offered to return, to the defendant the moneys paid by him to or for plaintiffs' use, or an equivalent allegation, and we shall determine this appeal upon the theory of the parties as thus presented, reserving the question whether in a suit to cancel a contract of this character it is necessary for the plaintiff to place the defendant *in statu quo*, or to allege in his complaint that he has done so or made tender. Assuming for the purposes of this [3] appeal that such an allegation is required, we think the complaint sufficient; for it alleges that the defendant has had the use of the premises from the date of the contract to the commencement of the action; that the rental value of the property exceeds the amounts paid by defendant to, and for the use of, plaintiffs. All that the law requires under the rule recognized by the parties hereto is that the defendant shall be placed in as favorable a position as he was at the date of the contract, and plaintiffs' allegations in that respect are sufficient. It would be idle to require the plaintiffs to return to defendant the amount of payments made, if a decree in plaintiffs' favor would require defendant to account for an equal or greater amount. In *Lytle v. Scottish Am. Mort. Co.*, 122 Ga. 458, 50 S. E. 402, it is well said: "He [the vendee] is not entitled to a return of his purchase money until he has allowed, as a deduction therefrom,

all damages caused by his breach, one element of which will be the fair rental value of the property during the time he occupied it, even up to verdict." (29 Am. & Eng. Ency. of Law, 2d ed., 649, 652; *Wilson v. Moriarty*, 77 Cal. 596, 20 Pac. 134.)

2. It is insisted by appellant that at the time this action was commenced he sustained toward respondents the relationship of mortgagor to mortgagees, and that plaintiffs' only remedy was by foreclosure, under section 6861, Revised Codes. This contract is not in form a mortgage but an agreement to sell; however, it is insisted that since notes were given for the deferred payments, the vendee let into possession and the legal title retained by the vendors, equity will treat the transaction as a mortgage, and cases are cited which appear to lend support to this view. An examination of the authorities, however, will disclose the distinguishing characteristic in every instance. Every such case must be determined on its own facts and circumstances; for it is a cardinal rule in equity that the intention of the parties must give character to their transactions. In *Western Nat. Bank v. National Union Bank*, 91 Md. 613, 46 Atl. 960, the court said: "An equitable mortgage results from different forms of transactions in which there is present an intent of the parties to make a mortgage, to which intent, for some reason, legal expression is not given in the form of an effective mortgage; but in all such cases the intent to create a mortgage is the essential feature of [4] the transaction." This contract purports to be an agreement by the plaintiffs to sell, and by the defendant to purchase, certain real and personal property upon the terms and conditions specified. It provides that time shall be of the essence of it; that the vendors may at their option terminate it for failure on the part of the vendee to comply strictly with its terms, and that upon such termination, the property involved and all payments made by the vendee shall be the property of the vendors, and the vendee shall not have any action to recover. In view of these provisions, for us to hold that the transaction evidenced by the contract amounted to a mortgage would be to make a new contract for the parties, and one widely at variance with their mani-

fest intention—something a court of equity will not undertake to do.

3. It is next insisted that the relationship existing between the parties was that of landlord and tenant at will, and the notice to quit, given but eleven days before suit, was insufficient under section 4502 of the Revised Codes, and that this suit was brought prematurely. In speaking of the relationship existing between the parties to a contract to purchase real estate prior to default, the author of the article on Landlord and Tenant, in 24 Cyc. 884, says: "While in many cases a person in possession of premises under an executory contract of purchase has been said to be a tenant at will of the vendor, the rule supported by apparently the better authority is that, in a strict sense, the relation of landlord and tenant does not arise under such circumstances, it being said that there can be no implied contract from which the relation of landlord and tenant may arise in opposition to the express contract of sale." And, speaking of the same subject after default, the author says: "After default in, or abandonment of, the contract of sale, further occupancy by the vendee may raise an implied tenancy at will, or, according to some cases, at sufferance. But in the absence of a provision in the contract of sale for the creation of a tenancy, such as an express agreement to pay rent upon default, the failure of the purchaser to comply with his contract, or of the vendor to fulfill upon his part, will not cause the occupancy under the contract to be regarded as having been as tenant." It is elementary that the relationship of landlord and tenant arises out of contract, express or implied. (24 Cyc. 876.)

There is not any contention made—and there could not be—that this contract in terms creates the relationship of landlord and tenant; but apparently the theory is that after default the vendee holds possession at the pleasure of himself or of the vendor, and by some process is converted into a tenant at will. There are authorities which uphold this view, but with them we [5] do not agree. The decided weight of authority and the better reasoning support the view that there cannot be an implied agreement for the occupancy of the land, in the face of the

express contract that the vendee holds possession under his right to purchase. (*Carpenter v. United States*, 17 Wall. (U. S.) 489, 21 L. Ed. 680; *Griffith v. Collins*, 116 Ga. 420, 42 S. E. 743; *Quertermous v. Hatfield*, 54 Ark. 16, 14 S. W. 1096; *Brown v. Randolph*, 26 Tex. Civ. App. 66, 62 S. W. 981.) The right of the vendee to purchase continued after breach by him and until such time as the vendors saw fit to exercise the option given them by the contract to terminate it; so that it cannot be said that the contract to purchase was in full force and effect, and at the same time there was in effect, also, an implied agreement that the vendee should hold as tenant. The action of the parties under this contract completely negatives the idea that either ever intended that their relationship should be that of landlord and tenant.

4. Complaint is made of the ruling of the trial court in striking out the so-called counterclaims. In the first of these it is alleged that the plaintiffs orally represented to the defendant that the land—the subject of the agreement—comprised 365 acres, whereas in truth and in fact there were but 340 acres; that plaintiffs knew the representations to be false but defendant believed them to be true, relied upon them and in consequence thereof executed the contract. It is alleged that the land was valued at \$100 per acre, and defendant insists that, whether the contract be canceled or not, he should be given credit for \$2,500 because of this deficiency in the quantity of land. Assuming [6] these allegations to be true for the purposes of this appeal, they do not constitute a counterclaim. If false representations were made by the plaintiffs as alleged, the vendee, upon discovering the fraud, might have had just cause for rescinding the contract, or might have had a cause of action for damages for the breach; but he cannot set them up as a defense to plaintiffs' cause of action for a cancellation of the contract. If plaintiffs were seeking to recover the purchase price, and defendant could prove these allegations, he would be entitled to be relieved from the payments *pro tanto*, but the allegations, if true, do not tend to diminish or defeat the plaintiffs' recovery in this action and were properly stricken out. (*Osmers v. Furey*, 32 Mont. 581,

81 Pac. 345.) The defendant does not allege that he was damaged by reason of the deficiency in the quantity of land, and it is difficult to determine upon what theory he asserts this claim.

5. The second so-called counterclaim is predicated upon the refusal of plaintiffs to permit the defendant to sell forty acres of the land for \$6,000 and to approve the sale and credit defendant with the amount of this purchase price. It is alleged that prior to the execution of the written contract of May 1, 1907, plaintiffs and defendant had negotiated for the sale and had reached an oral agreement. It is then alleged that at the time this oral agreement was made, the plaintiffs contracted orally to permit the defendant to sell quantities of the land in question for not less than \$100 per acre, and to approve such sales and credit defendant with the amounts of such sale prices upon his contract price for the entire property. A breach of this oral agreement is then alleged, and defendant claims that he is entitled to be credited with \$6,000. But this contract, if made, was superseded [7] by the written contract of May 1, 1907, and since the written contract does not contain any provision for such transactions, defendant cannot be heard to assert any right under such oral agreement. It is not claimed that there is any mistake or imperfection in the written contract with respect to such transactions, and the written agreement must be considered, therefore, as containing all the terms of their contract which had been agreed upon at the time the written contract was executed. (Rev. Codes, secs. 5018, 7873; *Kelly v. Ellis*, 39 Mont. 597, 104 Pac. 873.) Since evidence to prove this alleged oral agreement [8] would not have been admissible (*Riddell v. Peck-Williamson Co.*, 27 Mont. 44, 69 Pac. 241; *Armington v. Stelle*, 27 Mont. 13, 94 Am. St. Rep. 811, 69 Pac. 115), the court properly refused to consider defendant's claim arising from such agreement.

6. In the third so-called counterclaim stricken out by the court, it is alleged that at the time the contract was made the plaintiffs represented to defendant that the ditches for the irrigation [9] of the land were in proper condition to carry and distribute the water over the land; that the defendant believed these representations and relied upon them, and planted crops of grain and

hay which required irrigation; that when the irrigation season of 1907 arrived, defendant discovered that the ditches were wholly unfit for the purposes intended, and to repair them he was put to an expense of \$403, and by reason of the delay incident to such repairing, his crops suffered from want of water and he was thereby damaged to the extent of \$1,150. These facts, if true, do not tend to diminish or defeat the plaintiffs' cause of action, and, therefore, do not constitute a counterclaim. Evidence of these facts, if admissible at all, was admissible under the general denial, as reflecting upon the question of the rental value of the land, for the purpose of enabling the court to determine whether the value of the use and occupation of the property by defendant equaled the amounts paid by him to, and for the use and benefit of, plaintiffs, and, as a consequence, to determine whether the parties were in the same relative positions as they were at the time the contract was executed. It appears from the record that the defendant introduced evidence, without objection, as to the condition of the ditches and the expense he was obliged to incur to repair them. He did not offer any evidence as to the damage to his crops, and since he did not do so, we are not called upon to determine whether, if offered, such evidence would have been admissible.

The trial court disregarded the questions arising upon the alleged failure of defendant to keep the buildings insured or to pay the assessments upon the ditch stock; but found that the defendant had breached the agreement by his failure to make the payments due on May 1, 1908, and the payments due on May 1, 1909. The court also found that the value of the use and occupation of the premises by the defendant was \$5,000, while the total amount paid by defendant to and for the use and benefit of plaintiffs was approximately \$3,000. These findings are not attacked at all; and assuming that they are fully supported by the evidence, the defendant is not in a position to complain; for had the item of expense for repairing the ditches and the full amount of damages claimed by him as the result of injury to his crops been credited to him, it would still be found that he had received, in the use and occupation of the premises, an

amount far exceeding the payments made by him, including the damages which he had suffered.

7. Our conclusions upon these specifications render it unnecessary to consider the remaining assignments, further than to say that we do not find any reversible error.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

FITZPATRICK, RESPONDENT, v. O'NEILL ET AL., APPELLANTS.

(No. 3,000.)

(Submitted September 20, 1911. Decided October 21, 1911.)

[118 Pac. 273.]

Corporations—Transfer of Stock—Equity—Promoters—Issuance of Stock for Services—Legality of Act—Board of Directors—Presumptions—Cancellation of Stock—When Nullity.

Corporations—Transfer of Stock—Refusal—Equity.

1. Where the officers of a corporation wrongfully refuse to recognize and register a valid transfer of stock, and issue a new certificate to the transferee, the party aggrieved may invoke the aid of a court of equity.

Same—Promoters—Issuance of Stock for Services—Legality of Act.

2. Where all the holders of corporate stock had knowledge that a certain number of shares were to be issued to the promoters of the company (who were already stockholders and president and secretary, respectively, of the company) for their services in its organization, and agreed that the amount so to be paid was reasonable and none were misled or deceived, the corporation could legally issue the stock.

Same—Issuance of Stock—Action by Board of Directors not Indispensable—Presumptions.

3. Though, under section 3833, Revised Codes, the corporate powers, business and property of domestic corporations must be exercised, conducted and controlled by a board of directors, formal action on its part may, even on important matters, be dispensed with where all the shareholders and directors are present and concur in the action taken. In such a case the board will be presumed to have ratified it, although it in fact did not act affirmatively in the matter.

Same—Presumptions.

4. Held, under the rule stated in paragraph 3, *supra*, that the action of the stockholders of a corporation at a meeting at which every

outstanding share of stock was duly represented and voted in favor of the issuance of a certain number of shares to the promoters of the company in payment for their services, a majority of the directors being present and assenting, will be deemed to have been ratified by the board of directors, especially in view of the fact that the stock so issued was subsequently twice voted without objection at stockholders' meetings at which the remaining directors were present.

Same—Cancellation of Stock—When Nullity.

5. An attempt to cancel certificates representing corporate stock legally issued upon a sufficient consideration is a nullity.

Same—Coming into Equity "With Clean Hands."

6. The trial court having found all the issues in favor of plaintiff in a suit to compel the officers of a corporation to transfer to him on the books of the company certain shares of its capital stock and issue a new certificate to the transferee, the contention that he was not invoking the aid of a court of equity "with clean hands," held without merit.

Appeal from District Court, Silver Bow County; John B. McClellan, Judge.

ACTION by J. B. Fitzpatrick against Frank D. O'Neill, J. J. Flanigan, and the Open Range Sheep Company. Plaintiff had judgment. Defendants appeal from the judgment and an order denying their motion for a new trial. Affirmed.

Mr. M. P. Gilchrist, for Appellants, submitted a brief and argued the cause orally.

A corporation is not liable to promoters for their services in creating it. "A promoter, though he purport to act on behalf of the projected corporation and not for himself, cannot be treated as agent because the nominal principal is not then in existence; and hence when there is nothing more than a contract by a promoter, in which he undertakes to bind the future corporation, it is generally conceded that it cannot be enforced." (*Weatherford etc. R. Co. v. Granger*, 86 Tex. 350, 40 Am. St. Rep. 837, 24 S. W. 795; *Telegraph v. Loetscher*, 127 Iowa, 383, 101 N. W. 773, 4 Am. & Eng. Ann. Cas. 667; *Tuttle v. George A. Tuttle Co.*, 101 Me. 287, 64 Atl. 496; reported, also, in Volume 8, page 260, Am. & Eng. Ann. Cas., with a profuse note citing a large number of cases.) The author of the note of the same case also says: "The courts of equity jurisdiction also refuse to enforce against a corporation a contract made on its behalf by

promoters, unless there appears to be some sound equitable reason demanding its enforcement."

Stockholders, even if unanimous, cannot sell or give away the corporate property, or make any contract which would be obligatory on the company. Their action is only advisory to the board of directors. (Rev. Codes, sec. 3833; *Sellers v. Green*, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589; *Humphreys v. McKissick*. 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473; *Old Dominion Copper M. & S. Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193.) "Title to corporate assets is in the corporation and not in the stockholders owning the stock therein." (*People's Nat. Bank v. Board of Commissioners* (Okl.), 103 Pac. 68.) "The stock in the treasury of the corporation belongs to the corporation." (*Old Dominion Copper M. & S. Co. v. Bigelow, supra*.)

A director of a corporation cannot vote at a directors' meeting by proxy, but must be personally present and vote himself. (Conyngton on Corporate Management, 133; Clark & Marshall on Private Corporations, sec. 681, and cases therein cited.)

The great weight of authority is to the effect that a gratuitous issue of stock to the promoters is void upon the existing stockholders and is invalid, and that the company has power to remedy the wrong and cancel the stock, as was done in the case at bar. (*Hughes v. Cadena de Cobre Min. Co.* (Ariz.), 108 Pac. 231; 3 Clark & Marshall on Private Corporations, 2067.)

"Statutory and legal remedies must usually be first resorted to and exhausted before resort can be had to equity." (13 Current Law, 1496; 11 Current Law, 1238; 9 Current Law, 1113, citing a large number of cases.) The plaintiff should have exhausted his remedy against C. B. McCarthy, at least, before attacking the company. The evidence shows clearly that McCarthy has sixty-five shares of stock about which there is no dispute, and could be required by a proper action to deliver the twenty-three shares purchased, or he could be required to respond in damages for the value of the stock. The evidence shows that the plaintiff made no demand upon C. B. McCarthy to make the stock good.

Messrs. Walsh & Nolan, and Mr. John E. Corette, submitted a brief in behalf of Respondent. *Mr. Corette* argued the cause orally.

Action in equity is proper procedure. Where capital stock is purchased as an investment the transferee has a right to commence an action in equity to compel the transfer of the stock, and his action is not necessarily an action at law for damages. We cite and call the court's attention to the following: Clark & Marshall on Private Corporations, pp. 1842, 1843, and cases cited; Morawetz on Corporations, secs. 214-221; Thompson on Corporations, secs. 24, 25; *Cushman v. Thayer*, 76 N. Y. 365, 32 Am. Rep. 315; *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084; 1 Beach on Corporations, sec. 464; 2 Pomeroy's Equity Jurisprudence, sec. 1402.

Where the incorporators and promoters performed the services and the corporation after its organization entered into an express contract to pay them for such services, and did pay them, then we contend that the contract was legally entered into and fulfilled, and that the corporation had no right to refuse to transfer the stock after it had passed into the hands of an innocent transferee, and we contend that the consideration being on the contract expressly entered into by the corporation several months after its organization is or was on a sufficient consideration and was binding upon the corporation. (See Clark & Marshall on Corporations, 316; *Low v. Connecticut etc. Co.*, 45 N. H. 370; *Farmers' Bank v. Smith*, 105 Ky. 816, 88 Am. St. Rep. 341, 49 S. W. 810; *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; *Gilkinson v. Third Ave. R. Co.*, 47 App. Div. 472, 63 N. Y. Supp. 792; *Franklin Fire Ins. Co. v. Hart*, 31 Md. 59.)

Where all the stockholders of a corporation are present and all the legal directors being stockholders are present and vote as stockholders, and such stockholders unanimously authorize an action, the action is of the corporate character and is binding on the corporation. (3 Thompson on Corporations, 3976; *Burr v. McDonald*, 3 Gratt. (Va.) 215; *Eureka Iron Wks. v. Bresnahan*, 60 Mich. 332, 27 N. W. 524; *Union Pacific v. Chicago etc. Ry. Co.*.

163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265; Morawetz on Corporations, secs. 228-623; *Des Moines Gas Co. v. West*, 50 Iowa, 16; *People v. North R. Sugar Co.*, 121 N. Y. 382, 18 Am. St. Rep. 843, 24 N. E. 834, 9 L. R. A. 33; *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541, 30 N. E. 279, 15 L. R. A. 145; *Union Loan & Trust Co. v. Southern Cal. Motor Road Co.*, 51 Fed. 840; *Jordan v. Collins*, 107 Ala. 572, 18 South. 137; *Kenton Furnace R. R. & Mfg. Co. v. McAlpin*, 5 Fed. 737; *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779.)

Acts of the corporation are ratified by acquiescence, laches or supineness of stockholders. "Proceedings by the directors, or some of them, at an illegal or irregular meeting, may be ratified by them at a subsequent legal meeting, and thereby rendered valid. Or the proceedings may be expressly ratified by the stockholders, or the illegality or irregularity cured by their acquiescence with knowledge of the facts." (3 Clark & Marshall on Corporations, 2089; 10 Cyc. 327; *Woodbridge v. Pratt & Whitney Co.*, 69 Conn. 304, 37 Atl. 696; *Farmers' Bank v. Smith*, 105 Ky. 816, 88 Am. St. Rep. 341, 49 S. W. 810; *Burr v. McDonald, supra.*)

MR. JUSTICE SMITH delivered the opinion of the court.

This action was begun in Silver Bow county to compel the defendants O'Neill and Flanigan, who are president and secretary, respectively, of the defendant corporation Open Range Sheep Company, to transfer to the plaintiff on the books of the company, twenty-three shares of its capital stock theretofore standing in the name of C. B. McCarthy, and to issue to plaintiff a certificate of stock in his own name for said number of shares. The district court found generally in favor of the plaintiff and entered a judgment as prayed for. The cause was tried without the assistance of a jury. Defendants appeal from the judgment and also from an order denying their motion for a new trial. The record is voluminous, but careful examination thereof dis-

closes but few contested questions of fact, all of which are presumed to have been resolved in favor of the respondent.

There is substantial evidence to warrant the following specific findings of fact: In the summer of 1906 the appellant O'Neill owned a sheep ranch near Miles City which was mortgaged; the mortgage was about to be foreclosed, and O'Neill gave to C. B. McCarthy an option to purchase the ranch. McCarthy associated himself with the respondent Fitzpatrick and, after spending some time in perfecting the necessary preliminary arrangements, on November 21, 1906, they organized the Open Range Sheep Company with a capital stock of \$95,000, divided into 950 shares of \$100 each, and (apparently) five directors; O'Neill received 175 shares of the capital stock for his ranch, and the company assumed his indebtedness; Fitzpatrick and McCarthy, at that time president and secretary, respectively, issued to themselves 345 shares as promotion stock, and each purchased sixty-five shares, paying cash and par therefor. The company then sold to the appellant Flanigan fifty shares of treasury stock for \$5,000 in cash. On March 25, 1907, a meeting was held in the office of Judge McHatton at Butte, which meeting was attended by Sydney Sanner, Esq., as attorney for O'Neill; Judge McHatton, who had theretofore been named as a director but who was not a stockholder; McCarthy and Fitzpatrick. The purpose of this meeting was to settle differences which had arisen relative to the 345 shares of so-called promotion stock held by McCarthy and Fitzpatrick. Judge McHatton and Mr. Sanner informed them that they had no right to these shares of stock issued to themselves without authority, but Judge McHatton said that they were entitled to some remuneration for promoting the company. Mr. Sanner said: "They certainly are. What do you think is right?" Fitzpatrick replied: "About fifty shares or \$5,000." Mr. Sanner said: "That is very reasonable, and I will advise Mr. O'Neill to do that," also stating that he expected that they would charge \$10,000. Someone then suggested that McCarthy write to Flanigan, who was at Hot Springs, Arkansas, relative to the

matter under discussion, and McCarthy immediately wrote a letter, of which the following is a copy:

"March 26, 1907.

"Friend Jerry:

"There will be a meeting of the stockholders of the Open Range Sheep Company, held at its offices in Butte, Montana, for the purpose of electing a board of directors and officers of the company and such other business that might properly come before it. Said meeting to be held within two weeks from this date or as soon as we can get your proxy, which proxy we would like that you send here at the earliest possible date. This meeting was discussed last evening by the directors, that is Judge McHatton, Mr. Fitzpatrick, Mr. Sanner (representing Mr. O'Neill), and myself, and it was the sense that you be written with request that you sign the enclosed proxy for your wife, Mrs. Flanigan, in order that she might vote for you at said meeting, in your stead. The proposition of what would be fair to allow McCarthy-Fitzpatrick for their trouble in getting the property of the company together, and in organizing it, was the opinion of those present that fifty shares would be reasonable for said work, all of which would be satisfactory to us. Now, in order to make this legal it would be necessary for the stockholders to vote this amount of stock to us as compensation for the organization of the company, at a meeting to be held within two weeks. If you think it reasonable you might instruct Mrs. Flanigan to so vote. We have, as you know Jerry, put in all of our time in the organization of this company, and have paid in cash for shares of stock we have. We have never made any charge for looking after the business thus far, and we thought it only fair that the company allow us a reasonable amount for our services rendered. This will, of course, be in stock. The company is in excellent shape, and will, I am sure, be able to pay a handsome dividend on the investment this year. Trusting that you will give the matter of signing the enclosed

proxy your early attention, in order that it will reach us at the earliest possible date, we are,

"Respectfully yours,

"McCarthy-Fitzpatrick, Inc.

"Per C. B. McCarthy."

Inclosed was a blank proxy, drawn by Judge McHatton. Flanigan replied: "I have instructed Mrs. Flanigan that you are [or] Fitz would instruct her Mc what is right is right please find enclosed proxy as you requested." Inclosed in this letter was the power of attorney or proxy, running to Mrs. Lou Flanigan and duly signed by her husband. By this power of attorney, authority was expressly delegated to vote in favor of the issuance of twenty-five shares of stock each to McCarthy and Fitzpatrick. The 345 shares of promotion stock held by McCarthy and Fitzpatrick were surrendered and canceled on March 26, 1907. On April 6, 1907, a directors' meeting was held in Butte, at which Fitzpatrick, O'Neill and McCarthy were present; at this meeting the matter of giving McCarthy and Fitzpatrick twenty-five shares of stock each for promoting the company was discussed; a stockholders' meeting was subsequently held on the same day. The following is a minute of what took place at this stockholders' meeting:

"Minutes of a special meeting of the stockholders of the Open Range Sheep Company, held at its offices in Butte, Montana, this 6th day of April, 1907.

"Those present: F. D. O'Neill, representing 175 shares of stock. J. J. Flanigan (by proxy Mrs. Lou Flanigan) representing 50 shares. J. B. Fitzpatrick, representing 65 shares; and C. B. McCarthy, representing 65 shares.

"The following business to be acted on: F. D. O'Neill moves that the company deliver to C. B. McCarthy and J. B. Fitzpatrick 50 shares of the capital stock of the Open Range Sheep Company, to be in full payment for all services rendered in promotion of the said company. J. J. Flanigan (by proxy Mrs. Lou Flanigan) representing 50 shares, in favor of the resolu-

tion; F. D. O'Neill, representing 175 shares, in favor; C. B. McCarthy, representing 65 shares; and J. B. Fitzgerald, representing 65 shares, in favor of the resolution.

"No other business being before the meeting, on motion adjourned.

"FRANK D. O'NEILL.

"J. J. FLANIGAN,

"Prox. MRS. LOU FLANIGAN.

"J. B. FITZPATRICK.

"C. B. McCARTHY."

The minutes of the directors' meeting of April 6 show an attempt to substitute O'Neill for Brophy as a director, and the former afterward acted and voted as such. On the day before the stockholders' meeting of April 6, McCarthy called on Mrs. Flanigan and showed her the letter from her husband, together with the proxy. The latter document was present, on the table, during the stockholders' meeting and was then filed with other papers of the company. As to what took place at the meeting, O'Neill testified as follows: "I explained to Mrs. Flanigan and those there that these men felt they were entitled to certain remuneration and that it had been decided by attorneys and others that they were entitled to \$5,000 in stock, with the understanding that they would proceed to promote and further and make a success of the business and settle all our little differences and everything else; and, for general welfare of the business, we were granting these men that amount of stock, not merely for the services they had rendered, but with the understanding that they would then take the position of promoters and promote the business to a final success which they have not done to this time." After the meeting twenty-five shares of stock were issued to McCarthy by certificate No. 12, and twenty-five to Fitzpatrick by certificate No. 11. On July 17, 1907, a stockholders' meeting was held at Miles City, at which McCarthy voted all of his shares without objection. Certain by-laws were adopted, by one of which it was provided that the number of directors should be three. A president and general manager,

vice-president, secretary and treasurer, and three directors were elected. One of the by-laws adopted reads as follows. "No stock of this company now in the treasury shall be sold or disposed of to any person for any price or for any purpose except by a vote of the majority of the stock outstanding, at a meeting regularly called for that purpose, and no stock in the treasury shall in any case be sold for less than par." At a stockholders' meeting held on August 5, 1907, at Butte, Judge McHatton, as proxy for Fitzpatrick, voted all of the latter's stock without objection. The stockholders at this meeting ratified the proceedings had at Miles City on July 17, again elected a board of directors and a president and general manager, authorized the president to sign checks and pay the current expenses of the company, and resolved that certain payments be made upon a mortgage against the company, held by the First National Bank of Miles City. On December 2, 1907, Fitzpatrick purchased of McCarthy, for a valuable consideration, twenty-three of the twenty-five shares of stock evidenced by certificate No. 12, and on January 16, 1908, these twenty-three shares were assigned to him by indorsement on the back of the certificate. The stock was purchased as an investment. On January 20, 1908, O'Neill and Flanigan purported to hold a directors' meeting at which they ordered certificates Nos. 11 and 12 canceled. On March 18, 1908, O'Neill, as president, and Flanigan, as secretary, notified McCarthy and Fitzpatrick that the stock had been canceled. On April 9, 1908, Fitzpatrick presented certificate No. 12 to Flanigan, as secretary, with the request that the stock be transferred in accordance with the assignment thereof, and Flanigan refused, stating that it was canceled.

1. While some suggestion is made in the brief of counsel for the appellants that the plaintiff is not in a situation to invoke the aid of a court of equity, the point does not appear to be insisted upon; and we are satisfied, moreover, that under the circumstances of this case, it is not well taken. In their excellent [1] work on Private Corporations, volume 3, section 605, Messrs. Clark and Marshall thus express the rule: "There are

some cases in which it has been held that a suit in equity will not lie to compel a corporation to register a transfer on its books and issue a new certificate to the transferee, on the ground that there is an adequate remedy at law by an action to recover damages for its refusal to recognize and make the transfer. This view, however, is contrary to the overwhelming weight of authority. An action for damages does not always afford an adequate remedy for refusal of a corporation to recognize a person as a stockholder, and it is well settled, therefore, that if a corporation wrongfully refuses to recognize and register a valid transfer of stock, and issue a new certificate to the transferee, he may maintain a bill in equity to compel it to do so." And see our own case of *Barker v. Montana Gold etc. Co.*, 35 Mont. 351, 89 Pac. 66.

Counsel also says: "After reading the pleadings and the evidence, the court will observe that the material issue of fact involved herein is: Was the vote of the stockholders in favor of paying C. B. McCarthy and J. B. Fitzpatrick for promotion services induced and secured upon the supposition that the company was legally liable therefor?" And again: "As a matter of law, is, or was, the company liable to its promoters for services in creating it?" We find nothing in the record to justify a finding that McCarthy and Fitzpatrick induced the stockholders to vote in favor of the issuance of stock to them by any claim that the corporation was legally liable for promotion services, or that any threats were made which impelled the stockholders to vote contrary to their convictions in the matter. We find no evidence of deceit or misrepresentation on the part of McCarthy and Fitzpatrick. On the contrary, they appear to have been very frank and open in the premises, submitting to the judgment of Judge McHatton and Mr. Sanner when advised that they could not hold the 345 shares, and when at the suggestion of the attorneys they were invited to name a sum which would be satisfactory to them for their services, they named an amount which was regarded by all present as reasonable and proper. The testimony of the appellant O'Neill himself is amply sufficient to show that the issuance of the two certificates Nos. 11

and 12 was the result of an arrangement which was perfectly agreeable and satisfactory to all present at the stockholders' meeting of April 6, 1907. McCarthy fully and fairly stated the facts to Flanigan and the latter executed the proxy to his wife with full knowledge that his stock was to be voted in favor of the issuance of the stock in dispute.

It is not necessary to decide here whether there is any liability on the part of a corporation to its promoters in the absence of an express promise by it after organization. On April 6, 1907, [2] the Open Range Sheep Company was fully organized, although all of its capital stock had not been subscribed. No question as to the rights of subsequent stockholders having no knowledge of the issuance of the stock is before us. All of the then stockholders had knowledge that the stock was about to be issued and all agreed to the issuance. No stockholder was misled or deceived. All agreed that the amount issued was reasonable. Under these circumstances we are of opinion that the corporation could legally issue stock in payment for services performed in its promotion and organization, and that the issuance of such stock must be deemed to have been upon sufficient consideration. (See 1 Clark & Marshall on Private Corporations, sec. 103; *Hayward v. Leeson*, 176 Mass. 310, 320, 57 N. E. 656, 49 L. R. A. 725; *Franklin Fire Ins. Co. v. Hart*, 31 Md. 60; *Western Screw & Mfg. Co. v. Cousley*, 72 Ill. 531.)

2. But it is contended that the stock could not be legally issued by authority of the stockholders. Appellants maintain that the directors alone possessed the power to bind the corporation [3] in this regard. Section 3833, Revised Codes, provides that the corporate powers, business and property of all domestic corporations must be exercised, conducted and controlled by a board of directors. But it is not the universal rule that the corporation must act exclusively through its board of directors. "Formal action is often dispensed with, even in the most important matters, where all the members of the corporation, including the shareholders and directors, are present and concur, although there is no formal vote either of the shareholders or of the directors." (10 Cyc. 761; *Lemars Shoe Co. v. Lemars*

Shoe Mfg. Co., 89 Ill. App. 245.) In the case of *Eureka Iron & Steel Works v. Bresnahan*, 60 Mich. 332, it was held that a chattel mortgage agreed upon and assented to by all the directors and stockholders of a corporation assembled together, and drafted and executed in their presence, was valid, notwithstanding "there was no formal action, or the record of any action taken, carried on the records of the company authorizing the making of the mortgage." Perhaps the leading case on this subject is *Union Pac. Ry. Co. v. Chicago etc. Ry. Co.*, 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265. In the opinion prepared by the late Chief Justice Fuller, it appears that the executive committee of the Union Pacific Railway Company passed a resolution approving a certain contract and authorizing the president of the company to execute it; that afterward the stockholders at their regular annual meeting voted to approve the contract and the action of the executive committee relative thereto. The board of directors never formally acted. The parties to the contract immediately entered upon its execution. The court summarily disposed of the matter in the following language: "Appellants contend that the action of the stockholders and the executive committee was ineffectual because the board of directors was the only body that could authorize the president and secretary to make the contract. The contract appearing on its face to have been duly executed, and the parties having entered upon its execution, necessarily with the full knowledge on the part of the board of directors of the Pacific Company, the board would be presumed to have ratified it, although it in fact took no affirmative action in the matter."

The case at bar is even stronger than the federal case in favor of the validity of the action of the stockholders and the ratification of their act by the board of directors. The record shows that at the time this resolution was taken the corporation had not adopted any by-laws, but when by-laws were finally adopted, on July 17, 1907, it was expressly provided that no treasury stock should be sold or disposed of except by a vote of the majority of the outstanding stock. This by-law discloses the attitude of the corporation in the matter of disposal of stock. The

minutes of the several meetings, heretofore quoted, show that the stockholders of the corporation performed many of the [4] ordinary functions of management usually left to the directors. At the meeting at which the stock was voted to McCarthy and Fitzpatrick every outstanding share of stock was duly represented and voted in favor of O'Neill's motion; every director who held any stock was present, save Flanigan; and if we assume that O'Neill was properly elected as a director in place of Brophy (a matter which he may not question after having acted as such), then a majority of all the directors was present and assenting. The fact that McCarthy and Fitzpatrick also voted their stock is immaterial, for the reason that the result would have been the same had they not done so. In addition to the foregoing we have the fact that this stock was subsequently twice voted without objection at stockholders' meetings at which Flanigan and O'Neill were both present. Under these circumstances we are satisfied that it would be altogether inequitable for this court to declare these two certificates of stock invalid as having been issued without authority.

3. The fact that the by-laws provided that none of the officers of the corporation should receive any salary or compensation for any services rendered or to be rendered has no bearing upon the questions we have under consideration.

4. The stock having been legally issued upon a sufficient [5] consideration, the attempt to cancel the certificates was a nullity.

5. In view of the fact that the court below found all of the [6] issues in favor of the plaintiff, we find nothing in the record to justify the conclusion that he is not invoking the aid of the court "with clean hands."

We have examined the other specifications of error but find nothing to warrant a reversal.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

CARPENTER, APPELLANT, v. NELSON, RESPONDENT.

(No. 3,013.)

(Submitted September 27, 1911. Decided October 21, 1911.)

[118 Pac. 272.]

Trial by Court Without Jury—Weight of Evidence—Question for Court—Conclusiveness of Finding.

1. In an action tried by the court without the aid of a jury, in which defendant's motion, made at the conclusion of plaintiff's case, for judgment in his favor was granted, the question of the weight to be given to the testimony of plaintiff and his witnesses was one for the determination of that court, with which the appellate court will not interfere.

Appeal from District Court, Gallatin County; J. Miller Smith, a Judge of the First Judicial District, presiding.

ACTION by Albert Carpenter against Harry Nelson. Defendant had judgment, and plaintiff appealed. Affirmed.

Mr. J. L. Staats, for Appellant, submitted a brief and argued the cause orally.

Mr. H. A. Bolinger submitted a brief in behalf of Respondent and argued the cause orally.

MR. JUSTICE SMITH delivered the opinion of the court.

This is the second appeal in the case. (See *Carpenter v. Nelson*, 41 Mont. 392, 109 Pac. 857.) The cause was remanded to the district court of Gallatin county with directions to overrule defendant's demurrer to the amended complaint. Such action was taken, and after issue of fact joined, the cause was tried to the court sitting without a jury. At the conclusion of plaintiff's case the defendant moved for judgment in his favor. The motion was granted and judgment was entered accordingly, from which judgment an appeal has been taken to this court.

The testimony shows, in effect, that the plaintiff purchased fifty-five head of steers of the defendant at Bozeman, Montana, and received a bill of sale therefor, as follows:

"December 7, 1907.

"This is to certify that at a public auction sale of cattle of estate of Patrick Finnegan, deceased, Albert Carpenter bought 55 head of yearling steers, brand 'X' on right hip and right ear cropped.

"(Signature) HARRY NELSON,
"Admr. P. Finnegan, Esq."

The plaintiff and his witnesses testified that after the sale the cattle were driven twenty-six miles into the country to the ranch of one Knadler. The next day they were branded, and at that time the plaintiff noticed one steer in the herd which, as he says, "did not correspond exactly to the Finnegan mark, that is, on one of the animals." The next spring, however, it was discovered that this animal did not bear the "X" brand, but a brand belonging to one Joseph Davis. Mr. Davis afterward claimed and secured the animal from the plaintiff. Neither the plaintiff nor any of his witnesses were able to testify positively that the Davis steer was among those purchased at Bozeman. They did testify circumstantially to the precautions taken by them in driving the cattle home, for the purpose of making a *prima facie* showing that the Davis steer was not picked up on the road but was one of the steers turned over to the plaintiff at the sale. Carpenter, however, was unable to give positive testimony upon the subject. He very frankly testified as follows: "As far as I know, these fifty-five head of cattle knocked off to me by the auctioneer were the same bunch we took home. I could not say positively that this steer that wasn't branded 'X' was obtained by me from the Finnegan estate, because I couldn't see all the brands, but I didn't see him come into the bunch. We took as good care of these cattle as we could; it was to my advantage to do so. I called Mr. Knadler's attention particularly to it along the road and every time we passed through cattle I had him count them and I did myself; accidents are liable to happen, one might have got in or changed at the bridge, or something like that; but to the best of my knowledge

and belief we had the same animals that we started from Bozeman with and we branded them the next day."

Knadler, who helped drive the cattle, testified: "If we didn't lose the 'X' steer there and pick up another one during the time I and Mr. Carpenter were moving the steers from one place to another, I suppose that this steer that didn't have the 'X' brand that has been testified to was in the bunch that Carpenter bought. We got up to my place about eight o'clock in the evening; if I remember, it just begun to get dusk at a point about seven miles from home. If these cattle were mixed with others from this point on, it would have been difficult to distinguish and separate them."

Several very interesting questions of law are raised in the brief of counsel for appellant and have been argued at the bar of this court; but we do not find it necessary or think it proper to decide them. The question of the weight to be given to the testimony of the plaintiff and his witnesses was essentially one for the district court to determine. Had that court decided that he had made a *prima facie* case, we should be very loath to disturb the finding. On the other hand, as the court held in effect that it was not satisfied from the testimony that all of the steers purchased were not delivered, we are equally reluctant to disturb the finding. There is no question under the evidence but that fifty-five head of steers were delivered to him and taken out of the corral at Bozeman. Neither is there any question but that he had the same number in his possession when he reached his home ranch. When he arrived there he had but fifty-four "X" steers and one Davis steer. The judgment for the defendant ordered by the district court necessarily involves the finding that he had failed to prove that he had not lost an "X" steer on the road and picked up the Davis steer in place thereof. As has heretofore been said, however, the question of the weight to be given to the testimony of the witnesses was for the district court, and that court having determined

that it was not sufficiently convincing to make out a case for the plaintiff, we shall not interfere.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. BROWNE, RELATOR, v. BOOHER, POLICE JUDGE, RESPONDENT.

(No. 3,078.)

(Submitted September 28, 1911. Decided October 21, 1911.)

[118 Pac. 271.]

Supreme Court—Prohibition—When Writ Does not Lie.

1. Under section 7228, Revised Codes, authorizing the supreme court to issue a writ of prohibition to an inferior tribunal where there is not any plain, speedy and adequate remedy in the ordinary course of law, the writ does not lie to prevent further prosecution of an action in a police court to punish relator for a violation of a city ordinance, alleged by him to be void for various reasons, the remedy by appeal or by writ of *habeas corpus* being thorough and complete.

Original application by George T. Browne for writ to prohibit the prosecution of an action against him brought in a police court. Dismissed.

Mr. Jesse B. Roote, for Relator, submitted a brief and argued the cause orally.

Mr. H. Lowndes Maury, Mr. John A. Smith, and Mr. N. A. Rotering submitted a brief in behalf of Respondent. *Mr. Rotering* argued the cause orally.

MR. JUSTICE SMITH delivered the opinion of the court.

On the 20th day of September, 1911, a complaint was filed in the police court of the city of Butte charging the relator with

"keeping in connection with a saloon conducted by him, rooms without doors, in which said rooms female persons were permitted to enter for the purpose of being supplied with wine, liquor and beer, contrary to the provisions of section 1 of ordinance 775 of the city of Butte." He has applied to this court for a writ to prohibit the further prosecution of said action. The points sought to be raised are, (1) that the same act is also made an offense under section 8385, Revised Codes, and therefore the city of Butte has no authority to punish it, and (2) that the ordinance is void for the reason that it violates section 3265 of the Revised Codes, in that it contains more than one subject.

Section 7228, Revised Codes, provides that a writ of prohibition may be issued by the supreme court to any inferior tribunal in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. The supreme court of Washington under similar enactments and circumstances refused to issue the writ. The court said: "In this case the appellant had an adequate remedy in the ordinary course of law, either by appeal from an adverse judgment or by application for a writ of *habeas corpus*." It is to be remembered, also, that the relator may be acquitted of wrongdoing. In the case of *State ex rel. Hainsworth v. Shannon*, 130 Mo. App. 90, 108 S. W. 1097, the St. Louis court of appeals refused to prohibit the prosecution of the relator in the police court for alleged violation of a smoke ordinance. It was contended that, for various reasons, the ordinance was void. The court said: "Relator had a perfect remedy by an appeal in the first instance to the circuit court, and later, if need be, to this court."

The court of appeals of New York, in *People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A., n. s., 159, 9 Ann. Cas. 972, said: "We are of opinion that the subpoena issued by the magistrate was void upon its face, and that it called for obedience to its commands on the part of no one. We are also of opinion, however, * * * that prohibition is not the proper remedy. The writ of prohibition is not favored by

the courts. Necessity alone justifies it. Although authorized by statute, it is not issued as a matter of right, but only in the exercise of sound judicial discretion when there is no other remedy. * * * In no sense is it a substitute for an appeal. * * * It is justified only by extreme necessity when the grievance cannot be redressed by ordinary proceedings at law, or in equity, or by appeal. * * * We think the relator had a remedy which, even if indirect and inconvenient, deprived him of the right of prohibition. * * * There was a remedy, thorough and complete, through the writ of *habeas corpus.*" (See, also, *State ex rel. Spalding v. Benton*, 12 Mont. 66, 29 Pa. 425; 32 Cyc. 613.)

The proceedings are dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

**STATE EX REL. STEPHENS, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.**

(No. 3,069.)

(Submitted October 5, 1911. Decided October 21, 1911.)

[118 Pac. 268.]

***Mandamus—Change of Venue—Action Against Public Officer—
Affidavit of Merits—Sufficiency.***

Change of Venue—Affidavit of Merits—Sufficiency.

1. The affidavit of merits required by section 6505, Revised Codes, on demand for a change in the place of trial, need not set forth the facts relied upon by the defendant as a defense to the action, but is sufficient if it contains the statement "that defendant has fully and fairly stated the case to his counsel and that he has a good and substantial defense upon the merits in the action, as he is advised by his counsel and verily believes."

Same—Joinder of Causes of Action—Effect.

2. Where two of three causes of action alleged were of such a nature as to entitle defendant to a change of venue to the county of his residence, the fact that a third was joined which gave him no

such privilege did not abridge his right to demand a change in the place of trial.

Same—Action Against Public Officer.

3. *Held*, under section 6502, Revised Codes, that an action against the warden of the state penitentiary, a public officer, for tortious acts alleged to have been committed by him in the exercise of his authority as such officer, was properly sent for trial to the county in which the acts were claimed to have been done.

Same—Counter-motion to Retain Jurisdiction.

4. Where a cause was on motion of defendant rightly transferred to another county for trial, plaintiff's counter-motion that it be retained because of the fact that he could not have a fair and impartial trial in that county, was properly disregarded. His remedy was by motion for change of venue in the district court of the county to which the action was sent.

ORIGINAL application for writ of *mandamus* to compel the district court of Silver Bow county, and John B. McClernan, one of its judges, to vacate an order granting a motion for a change of venue, and to enter one denying such motion. Dismissed.

Mr. C. A. Wallace submitted a brief in behalf of Relator, and argued the cause orally.

Mr. C. F. Kelley, Mr. L. O. Evans, and Mr. W. B. Rodgers, for Respondents, submitted a brief. *Mr. Kelley* argued the cause orally.

MR. JUSTICE SMITH delivered the opinion of the court.

Application for a writ of *mandamus* to compel the district court of Silver Bow county and the Honorable John B. McClernan, one of its judges, to vacate an order made in the case of Oram Stephens (this relator), against Frank Conley, granting the latter's motion for a change of place of trial to Powell county, and to make an order denying said motion. The relator is a resident of Silver Bow county, while Frank Conley resides in Powell county. He was, however, served in Silver Bow county. The complaint in *Stephens v. Conley* contains three causes of action. In the first the plaintiff alleges that ever since the 12th day of July, 1907, the defendant has been the warden of the state penitentiary at Deer Lodge in Powell

county; that P. J. Tuohy and Joseph Quesenberry were guards at the prison, in his employ, during the years 1908 and 1909; that while plaintiff was confined in the prison under a sentence of the district court of Fergus county, the defendant ordered Tuohy and Quesenberry to manacle and shackle him and to confine him in a dirty, filthy, loathsome, dark and obnoxious cell called the "Hole," which they did; that under Conley's direction the guards assaulted him, placed him in solitary confinement and fed him on bread and water. The second cause of action is predicated upon the allegation that Conley, as warden, retained plaintiff in custody at the prison for a period of 177 days after his term had expired. The third cause of action is for an alleged malicious prosecution after plaintiff was released from the prison.

The defendant's motion for a change of place of trial was based upon the following allegation, among others: "That the causes of action set forth in the complaint are for certain alleged acts specified in said complaint, done by said defendant in virtue of his office as warden of the penitentiary, and all of said causes of action arose in the county of Powell." Plaintiff filed a counter-motion praying that the cause be not sent to Powell county because of the fact that the people of that county are so prejudiced against him that he could not have a fair and impartial trial. This motion was overruled by the district court and that of defendant was granted.

Section 6502, Revised Codes, provides: "Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the * * * power of the court to change the place of trial; * * * 2. Against a public officer, * * *, for an act done by him in virtue of his office, * * *."

Section 6504 reads: "In all other cases, the action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or where the plaintiff resides, and the defendants, or any of them, may be found; * * * Actions upon contracts may be tried in the

county in which the contract was to be performed; and actions for torts in the county where the tort was committed; subject, however, to the power of the court to change the place of trial, as provided in this Code."

Section 6505 reads: "If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county."

When Conley appeared in the action he filed an affidavit of merits, and subsequently an amended affidavit was filed by leave of court. We find no abuse of discretion in allowing the amended affidavit to be filed. It reads as follows:

"Frank Conley, the defendant in the above-entitled cause, being first duly sworn, on oath deposes and says, the summons and complaint in this action were served on me on the 13th day of June, A. D. 1911. I further say that I have fully and fairly stated the case and all the facts in this cause, to C. F. Kelley, one of my counsel and attorneys in this case, who resides at No. 829 West Park street, in the city of Butte, Montana, and after such statement, I am advised by the said Kelley, and verily believe, that I have a good and substantial defense on the merits in this cause, and to all of the causes of action set forth in said complaint; that at all the times mentioned in plaintiff's complaint and at all times since, including the time of commencement of this action, affiant has been and now is a resident of, and resided in, and now resides in the county of Powell, state of Montana; that all of the alleged causes of action set forth in said complaint arose within, and all the alleged tortious acts, if any, alleged in said complaint, against this defendant, were committed within the said county of Powell, and that all of said alleged causes of action, which occurred subsequent to July 1, 1908, are brought against me by virtue of certain alleged acts, which it is alleged were either done by me, or suffered and permitted to be done by me, while

acting in the capacity of warden of the state penitentiary of the state of Montana, located in the city of Deer Lodge, in said county of Powell. That I am now, and during all of the times mentioned in said complaint, since July 1, 1908, have been the duly appointed, qualified and acting warden of the said penitentiary of said state."

1. It is contended that the affidavit of merits is insufficient in that it fails to set forth the facts relied on by the defendant as a defense to the action. The case of *Pearce v. Butte Electric Ry. Co.*, 40 Mont. 321, 106 Pac. 563, is cited by the relator to this point. This court held in the *Pearce Case*, following the earlier decisions on the subject, that to justify an order relieving a defendant from a default judgment, it was necessary to file an affidavit setting forth the facts constituting his defense or tender a copy of his proposed answer. The affidavit referred to is called in the opinions an "affidavit of merits" and is, strictly speaking, an affidavit setting forth the merits of the proposed defense. But the statute does not so denominate it. The Code (sec. 6589, Rev. Codes) provides that the court may relieve a party from a judgment, "in furtherance of justice, and on such terms as may be just," and this court, in *Donnelly v. Clark*, 6 Mont. 135, 9 Pac. 887, held that no relief should be granted unless the facts constituting the defense were stated in the moving affidavit. The rule there laid down has been since consistently adhered to and followed. (See, also, *Schaeffer v. Gold Cord Mining Co.*, 36 Mont. 410, 93 Pac. 344.) It may be confidently asserted, therefore, that an affidavit such as that presented in this case would not be sufficient to warrant the court in vacating a default judgment. And there is good reason for the rule. A judgment regularly entered after service of process is presumed to be just; and the burden is upon the defendant to make a *prima facie* showing that it is unjust. Mr. Chief Justice Wade, speaking for the court in *Donnelly v. Clark*, very pertinently inquired: "How could it be made to appear unless the nature of the defense is disclosed?"

But the affidavit required on demand for a change in the place of trial is specifically referred to in the statute as an "affidavit of merits." At the time of the adoption of the Code and for many years prior thereto the term "affidavit of merits" had a well-defined meaning. "On a motion to change the [1] venue defendant must swear to a meritorious defense, as he is advised by his counsel." (1 Ency. Pl. & Pr. 375.) "The form of the affidavit of merits usually required to be made by a defendant and which should generally be followed, is 'that defendant has fully and fairly stated the case to his counsel and that he has a good and substantial defense upon the merits in the action, as he is advised by his counsel and verily believes.' Every part of this form is material and any departure from it should be avoided." (2 Am. & Eng. Ency. of Law & Pr. 722.) We think the affidavit of merits required by section 6505, Revised Codes, is the formal affidavit referred to and the form of which is given in the authorities just quoted. The affidavit in this case is therefore sufficient.

2 It is contended by the counsel for relator that Silver Bow county was a proper place in which to try the action because of the fact that it was the county where plaintiff resides and where the defendant was served. And, it is argued, this being true, the plaintiff had a right to insist that the cause should be tried in that county, notwithstanding the fact that defendant resided in Powell county and the torts complained of were there committed. Under statutory provisions similar to ours, the court of appeals of Colorado held: "In an action for a tort the county where the defendant resides, and the county where the plaintiff resides and the defendant is served, and the county where the tort was committed, are equally proper counties for trial; and, if the action is commenced in any one of these counties, the place of trial cannot be changed, on the ground that the county designated is not the proper county." (*Denver etc. R. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285.) We may assume, without deciding, that the Colorado court has correctly interpreted the statute. But there is an element in this cause

which is lacking in the Colorado case. It is shown by the complaint that Conley is the warden of the state penitentiary and that some of the acts complained of were committed by him while in the exercise of his authority as such officer. The fact that other tortious acts are charged in the third cause of action [2] does not deprive him of his right to demand a change in the place of trial. (*Bond v. Hurd*, 31 Mont. 314, 78 Pac. 579.) There is no question that the warden of the state penitentiary is a public officer. (See sec. 9720, Rev. Codes.) Section 6502, Revised Codes, *supra*, provides that an action against a public officer, for an act done by him in virtue of his office, must be tried in the county where the cause of action, or some part thereof, arose, subject to the power of the court to change the place of trial. Section 6506, Revised Codes, provides: "The court or judge must, on motion, change the place of trial in the following cases: 1. When the county designated in the complaint is not the proper county. 2. When there is reason to believe that an impartial trial cannot be had therein. 3. When the convenience of witnesses and the ends of justice would be promoted by the change. 4. When, from any cause, the judge is disqualified, etc."

It is contended that the tortious acts complained of were not committed by the defendant "in virtue of his office," but we think there is no force in the suggestion. It could only have been by reason of the fact that he was warden, that opportunity was given to commit the alleged acts. If he could commit only legal acts "in virtue of his office," plaintiff would have no cause of complaint.

We think the legislature intended that an action against a public officer for a tort alleged to have been committed by him in the exercise of his authority as such officer, should be tried in the [3] county where the act was done; and that, in cases where the place of trial is otherwise properly selected by the plaintiff, the defendant has an absolute right to have it changed to the county where such act was committed. (*Cowen v. Quinn*, 13 Hun, 344; *Porter v. Pillsbury*, 11 How. Pr. 240.) The Code

provides that the action must be tried in that county. In all cases where the venue is properly laid, however, the court may change the place of trial where there is reason to believe that an impartial trial cannot be had in the county first selected, or when the convenience of witnesses and the ends of justice would be promoted by the change, or when the judge is disqualified.

Plaintiff's counter-motion was properly disregarded. That [4] motion could only be considered after the cause was sent to the proper county for trial.

The proceedings are dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT WRITTEN OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 2,982.—GEORGE PRUETT, RESPONDENT, *v.* MINNEAPOLIS STEEL & MACHINERY CO., APPELLANT.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Decided April 17, 1911.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and it is hereby, dismissed in accordance with stipulation of counsel on file herein.

Messrs. Kremer, Sanders & Kremer, for Appellant.

No. 3,005.—R. M. COBBAN REALTY CO., APPELLANT, *v.* N. H. BLACK ET AL., RESPONDENTS.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

Decided May 8, 1911.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with stipulation on file herein.

Mr. Elmer E. Hershey, and Mr. Wm. F. Wayne, for Appellant.

No. 2,963.—**J. C. EDWARDS, RESPONDENT, v. J. C. ENGLISH ET AL., APPELLANTS.**

Appeal from District Court, Lewis & Clark County; J. Miller Smith, Judge.

Decided June 7, 1911.

PER CURIAM.—The appeal in the above-entitled cause is hereby dismissed in accordance with motion of counsel for appellants.

Messrs. Walsh & Nolan, for Appellant.

No. 3,030.—**STATE EX REL. NESBIT ROCHESTER, RELATOR, v. DISTRICT COURT ET AL., RESPONDENTS.**

Original application for writ of supervisory control to the District Court of Silver Bow County and one of the Judges thereof.

Decided June 13, 1911.

PER CURIAM.—The relator's petition for writ of supervisory control herein, heretofore submitted, is, after due consideration by the court, denied.

Mr. C. M. Parr, for Relator.

No. 3,050.—CITY OF HELENA, APPELLANT, v. JOSEPH ERNST, RESPONDENT.

Appeal from District Court, Lewis & Clark County.

Decided September 8, 1911.

PER CURIAM.—The appeal in the above-entitled cause is hereby, upon appellant's motion, dismissed.

Mr. Edward Horsky, for Appellant.

No. 3,041.—CHAS. W. MORTON ET AL., APPELLANTS, v. A. S. d'AUTREMONT, RESPONDENT.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

Decided September 19, 1911.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed, on motion of appellant.

Messrs. De Kalb & Mettler, and Mr. C. W. Belden, for Appellants.

No. 2,966.—STATE OF MONTANA, RESPONDENT, *v.* OLIVER VAN, APPELLANT.

Appeal from District Court, Dawson County; Sydney Sanner, Judge.

Decided September 19, 1911.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed, in accordance with motion of respondent.

Mr. C. C. Hurley and Messrs. Loud & Campbell, for Appellant.

No. 3,079.—STATE ~~EX REL.~~ M. B. CASEY, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of supervisory control running to the District Court of Cascade County and the Judges thereof.

Decided September 25, 1911.

PER CURIAM.—Relator's petition for a writ of supervisory control herein is, after due consideration, denied.

Mr. Victor R. Griggs, for Relator.

No. 3006.—STATE OF MONTANA, RESPONDENT, *v.* GEORGE D. BLAIR, APPELLANT.

Appeal from District Court, Teton County; H. H. Ewing, Judge.

Decided May 27, 1911.

PER CURIAM.—Respondent's motion to dismiss the appeal herein is, after due consideration, sustained and the appeal hereby dismissed.

Mr. David J. Ryan, for Appellant.

Mr. Albert J. Galen, Attorney General, for Respondent.



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ACCOMPLICES.

See Criminal Law, 27.

ACTIONS.

Policy of Law.

1. It is not the policy of the law to require two actions to be prosecuted where one will afford the same relief.—*Wertz v. Lamb*, 477.

Estates—Recovery of Assets.

2. Pleadings in an action brought by an executor to recover as assets of his testator's estate certain certificates of deposit, claimed by defendant as a gift *causa mortis*, held to have presented purely legal issues, and not such as were cognizable in a court of equity.—*O'Neil v. O'Neil*, 505.

ADMISSIONS.

See, also, Criminal Law, 3; Demurrer, 1.

Trial—Issues—Stipulation—Construction.

1. A stipulation admitting that defendants, who by mesne conveyances had become the successors in interest of the locator of certain lode claims, "have acquired whatever right was obtained by the location" of such claims, was not an admission that the location of any one of them was valid or that the locator acquired any rights whatever thereunder, but simply relieved defendants from deraigning their title after proving valid locations of the claims.—*Washoe Copper Co. v. Junila*, 178.

Cautionary Instruction—When Refusal Error.

2. Held, that though the propriety of giving an instruction in the words of paragraph 4, section 8028, Revised Codes, that "the oral admissions of a party are to be viewed with caution," is a matter of discretion in the trial court, refusal to give it in this instance was error.—*McCrimmon v. Murray*, 457.

AFFIDAVIT OF MERITS.

Sufficiency,—see Change of Venue, 1.

AGENCY.

Negligence—Liability of Agents.

1. Defendant company's superintendent and mine foreman could be held liable only for their individual wrongful acts or omissions within the scope of their employment; therefore, an instruction which permitted a recovery of damages against both, without regard to whether the one or the other, or both, were guilty of the negligence alleged by plaintiff, was erroneous.—*Allen v. Bear Creek Coal Co.*, 269.

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Criminal Law—Appeal—Prejudice.

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New Trial—Order General in Terms—Affirmance.

2. Where the district court in granting a new trial does so in an order general in terms its action will be affirmed if it can be justified upon any one or more of the grounds assigned in the motion.—*Monson v. La France Copper Co.*, 65.

Same.

3. The supreme court will not interfere with an order granting a new trial, one ground of the motion for which was insufficiency of the evidence to support the verdict in favor of plaintiff, where the evidence was in direct conflict. If the court under such conditions is dissatisfied with the verdict it is its duty, in the exercise of its legal discretion, to grant a retrial.—*Monson v. La France Copper Co.*, 65.

Pleadings—Amendments—Bill of Exceptions—Record—Review.

4. An amended pleading supersedes the original one, is therefore no part of the judgment-roll, and can be made a part of the record on appeal only by bill of exceptions, properly settled; hence the action of the court in sustaining a motion to strike certain portions of the answer as originally drawn was not subject to review where the displaced pleading was not so identified.—*Bordeaux v. Bordeaux*, 102.

Equity—Written Evidence—Erroneous Exclusion—Review on Appeal.

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Review—Presumptions—Rulings at Trial.

6. Where the evidence in a proceeding for the enforcement of a mechanic's lien is such that it cannot be ascertained how the court and jury arrived at the amount awarded to the plaintiff, the supreme court in disposing of the case will give plaintiff the benefit of the presumption that all contested questions of fact were decided in his favor.—*Mills v. Olsen*, 129.

Appeal—Review—Verdict—Conflicting Evidence.

7. A verdict on conflicting evidence will not be reversed on appeal as contrary to the weight of the evidence, after the trial court has overruled a motion for a new trial.—*Flavin v. Chicago, B. & Q. R. R. Co.*, 220.

Equity Cases—Insufficiency of Evidence—Findings—Conclusiveness.

8. To secure a reversal of the decree in an equity case on the ground that the evidence is insufficient to sustain the findings of the court, the appellant has the burden of showing that the evidence preponderates against them.—*Orton v. Bender*, 263.

Error—Presumptions.

9. Error must be made to appear; it will not be presumed.—Orton v. Bender, 263.

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10. Under section 6746, Revised Codes, such errors in instructions as were not called to the attention of the district court at the settlement of the instructions will not be considered on appeal.—Allen v. Bear Creek Coal Co., 269.

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11. The instructions to the jury must be considered together.—Allen v. Bear Creek Coal Co., 269.

Jurisdiction—Remittitur—Effect.

12. When a *remittitur* is issued by the supreme court on appeal, it loses jurisdiction of the case.—State ex rel. Dolenty v. Reece, 291.

Defective Findings—Exceptions—Review.

13. A party who fails to make exception in the district court to findings claimed by him to be defective and to have the exception reserved in a bill of exceptions, may not complain of such defect on appeal.—Featherman v. Hennessy, 310.

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14. One not aggrieved by a finding may not base error upon it.—Featherman v. Hennessy, 310.

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15. An error not assigned in appellant's brief will not be considered on appeal.—In re Murphy's Estate, 353.

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17. An appeal from a judgment will be dismissed if not taken within one year after entry thereof. (Rev. Codes, sec. 7099.)—Wilson v. Norris, 454.

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18. A party who is not aggrieved by an order may not base an assignment of error on the court's action.—Bowlin Liquor Co. v. Fauver, 472.

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19. In an action tried by the court without the aid of a jury in which defendant's motion, made at the conclusion of plaintiff's case, for judgment in his favor was granted, the question of the weight to be given to the testimony of plaintiff and his witnesses was one for the determination of that court, with which the appellate court will not interfere.—Carpenter v. Nelson, 565.

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1. Section 7166, Revised Codes, allowing an attorney's fee to the claimant of a mechanic's lien, held unconstitutional.—Mills v. Olsen, 129.

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Crime—Justification—Reasonable Doubt—Instructions.

1. Where the commission of the homicide by the defendant was proved, the evidence on the part of the prosecution tending to show that the killing constituted murder, and the defense was that the killing was justifiable, an instruction that the burden of proving circumstances of justification lay upon defendant, the *quantum* of proof thus imposed upon him being only such, however, as upon the whole case would raise a reasonable doubt of his guilt, was correct.—State v. Crean, 47.

Contributory Negligence—Exculpation.

2. Though under Revised Codes, section 7962, paragraph 4, the law presumes that a person exercises ordinary care for his own safety, yet where plaintiff's own case presents evidence which, if unexplained, establishes *prima facie* contributory negligence, there must be evidence exculpating him, or he cannot recover.—Meehan v. Great Northern Ry. Co., 72.

Building Contracts—Extras.

3. In an action on a building contract for compensation, by the terms of which there was to be no change of the specifications, and no extra work unless agreed upon in writing, the burden of showing that there were extras to which payments made under the contract might be applied was on the plaintiff.—Piper v. Murray, 230.

Will Contests—Erroneous Instruction.

4. In a will contest, the general burden being upon the contestant to establish by a preponderance of the evidence the facts upon which he relies to set the will aside, it was error to instruct the jury that the proponent was bound to show that, insanity in testator having been shown to exist at a time preceding as well as subsequent to its execution, it was executed at a time when he was of sound and disposing mind, else they should find for contestant.—In re Murphy's Estate, 353.

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CHANGE OF VENUE.**Affidavit of Merits—Sufficiency.**

1. The affidavit of merits required by section 6505, Revised Codes, on demand for a change in the place of trial, need not set forth the facts relied upon by the defendant as a defense to the action, but is sufficient if it contains the statement "that defendant has fully and fairly stated the case to his counsel and that he has a good and substantial defense upon the merits in the action, as he is advised by his counsel and verily believes."—*State ex rel. Stephens v. District Court*, 571.

Joiner of Causes of Action—Effect.

2. Where two or three causes of action alleged were of such a nature as to entitle defendant to a change of venue to the county of his residence, the fact that a third was joined which gave him no such privilege did not abridge his right to demand a change in the place of trial.—*State ex rel. Stephens v. District Court*, 571.

Action Against Public Officer.

3. Held, on *mandamus* under section 6502, Revised Codes, that an action against the warden of the state penitentiary, a public officer, for tortious acts alleged to have been committed by him in the exercise of his authority as such officer, was properly sent for trial to the county in which the acts were done.—*State ex rel. Stephens v. District Court*, 571.

Counter-motion to Retain Jurisdiction.

4. Where a cause was on motion of defendant rightly transferred to another county for trial, plaintiff's counter-motion that it be retained because of the fact that he could not have a fair and impartial trial in that county, was properly disregarded. His remedy was by motion for change of venue in the district court of the county to which the action was sent.—*State ex rel. Stephens v. District Court*, 571.

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CITIES AND TOWNS.**Impeachment and removal of police judge,—see Constitution, 1, 2.****Municipal Water Plant—Extension of Indebtedness—Submission to Electors—When Proper.**

1. Where a city council had first acquired a pure and wholesome supply of water, ample for the needs of the city and its inhabitants, for a proposed water plant, and ascertained that the cost of installing it was within the compass of the sum which it could lawfully expend for that purpose, the submission of the question to the taxpayers (Rev. Codes, sec. 3259) whether the city's limit of indebtedness should be exceeded in the amount so ascertained for the purpose of procuring and installing such supply, was proper.—*Carlson v. City of Helena*, 1.

Same—Water Rights—Rights of Prior Appropriators—Diversion from Watershed.

2. A city had by purchase acquired the first four appropriations of water on a certain stream, the total quantity in which at certain

seasons of the year does not exceed 150 inches, which amount was ample, however, to supply the needs of the city and its inhabitants. The fourth in point of time was decreed to it in the amount of 1,000 inches, with the right to use it "beyond and without the watershed" of said creek. *Held*, in a suit for injunction, that under these conditions, the city was the first appropriator to the extent of 1,328 inches, the aggregate of the four appropriations, and that under the rule that a prior appropriator may change the point of his diversion or the use of his right, so long as it does not prejudicially affect that of any subsequent appropriator, the city had the right to divert the water from the watershed of the creek, in quantity sufficient to supply the needs of its proposed municipal water system.—*Carlson v. City of Helena*, 1.

Same—Election—Ordinances—Form—Injunction.

3. The fact that an ordinance provided for a special election to determine whether the limit of the city's indebtedness should be extended for the purpose of "procuring a water supply" and constructing a water system, when the city had already purchased and paid for such supply, could not have so far misled the electors to their prejudice as to require the issuance of an injunction to prevent the holding of the election. The electors were not injured by reason of the fact that an initial expense of installing the plant had already been met without their knowledge.—*Carlson v. City of Helena*, 1.

Officers—Removal—Written Charges.

4. Under Revised Codes, section 3236, providing for the removal by a city council of officers on written charges entered on their journal, written charges for the removal of an officer must be filed with the city council, and a proceeding for the removal of an officer has not been instituted until such charges are filed.—*State ex rel. Working v. Mayor*, 61.

Same—Removal—When Prohibition does not Lie.

5. Prohibition does not lie at the suit of a police judge of a city to prohibit the city council from proceeding to remove him from office, where written charges have not been filed as required by Revised Codes, section 3236.—*State ex rel. Working v. Mayor*, 61.

Nature of Powers.

6. A municipality possesses two classes of powers, (1) those which are governmental, legislative or public, and (2) those which are proprietary or private; in the exercise of the second class of powers it does not act as an agency of the government, but as a corporate individual representing the private advantage of the community for the government of which it was created.—*State ex rel. City of Helena v. Helena Waterworks Co.*, 169.

Water Supply—Injunction—Supreme Court—Original Jurisdiction.

7. In seeking to provide a water supply and construct a system for itself and its inhabitants, a city acted in its private corporate capacity, as distinguished from an exercise of its public powers; hence it was in no position to invoke the original jurisdiction of the supreme court, by way of injunction, in a controversy arising in connection with that enterprise.—*State ex rel. City of Helena v. Helena Waterworks Co.*, 169.

Police Department—Reducing Force—Power in City Council.

8. *Held*, that the power to reduce the police force, as constituted under the Metropolitan Police Law (Rev. Codes, secs. 3304-3317), if unnecessarily large or for economical reasons, resides in the city council and not in the mayor.—*State ex rel. Rowling v. Mayor*, 331.

Special Improvements—Assessments—Theory of Taxation.

9. The theory upon which a municipality may levy an assessment for a special improvement, such as the construction of a sewer, is that the property charged receives a corresponding physical, material and substantial benefit from the improvement.—*Power v. City of Helena*, 336.

Injunction—Complaint—Insufficiency—Estoppel.

10. To make the complaint of a property holder asking a court of equity to be relieved from the payment of a special improvement tax, levied on his property for the purpose of defraying the cost of the construction of a storm sewer, on the alleged ground that his property was so situated that it could not be benefited by the sewer, proof against a general demurrer, it must set forth that plaintiff appeared at the time and place designated in the resolution of the council for hearing objections to the proposed improvement, and that his protest was ignored; otherwise, after the improvement is made and warrants issued in payment thereof, he is estopped upon the face of his pleading.—*Power v. City of Helena*, 336.

Actions Against—Injuries to Property—Notice.

11. The provision of section 3289, Revised Codes, requiring that before a city or town can be held liable for damages for an injury on account of any defect in a street, sidewalk, etc., notice thereof must be given to the municipality, is applicable as well to injuries to property as it is to those of a personal character.—*Butte Machinery Co. v. City of Butte*, 351. (Overruled in *Kelly v. City of Butte*, 44 Mont. —.)

Same—Complaint—Insufficiency.

12. The complaint in an action against a city for damages to plaintiff's premises occasioned by a defective sewer-pipe, which failed to allege that the notice required by section 3289, Revised Codes, had been given to defendant city, did not state a cause of action.—*Butte Machinery Co. v. City of Butte*, 351.

Police Force—Illegal Mileage—Misconduct in Office—Evidence—Sufficiency.

13. Evidence held sufficient to support a finding that relator was guilty of misconduct in his office of chief of police in claiming and collecting mileage fees for services performed by one of his subordinates, relator paying to the latter his actual traveling expenses and retaining for himself the balance of the total amount received.—*State ex rel. Wynne v. Examining and Trial Board*, 389.

Same—Good Faith—Custom—Defenses.

14. That relator acted in good faith in claiming mileage, and the alleged fact that the method pursued by him in the premises was one in general vogue, did not constitute any defense.—*State ex rel. Wynne v. Examining and Trial Board*, 389.

Same—Improper Motives—Defenses.

15. Improper motives on the part of the examining and trial board of the police department in preferring charges against relator held immaterial under the circumstances.—*State ex rel. Wynne v. Examining and Trial Board*, 389.

Streets and Sidewalks—Notice of Defect.

16. A municipality being held only to the exercise of ordinary care to make and keep its streets in a reasonably safe condition, it is entitled, after notice, actual or constructive, of a defective condition or of the existence of an obstruction in a street imperiling the safety of persons traveling thereon, to a reasonable opportunity to act in the premises.—*McEnaney v. City of Butte*, 526.

Same—Complaint—Notice of Defect—Essential.

17. Since the liability of a municipal corporation to respond in damages for injuries alleged to have been caused by a defective condition or an obstruction in a street imperiling the safety of persons traveling thereon, depends upon notice of the alleged unsafe condition and the failure to exercise ordinary care to remedy it, the complaint in such an action must allege facts showing notice at a sufficient interval before the injury, to give the defendant reasonable opportunity to act.—*McEnaney v. City of Butte*, 526.

Same—Notice of Defect—Insufficiency of Complaint.

18. Complaint in an action against a city to recover damages for personal injuries alleged to have been caused by a fall upon a sidewalk where an accumulation of ice and snow had formed a smooth, slippery and slanting surface, *held*, insufficient, under the rule declared in paragraph 17, *supra*, in that it failed to state facts from which the length of time intervening between the injury and the alleged notice of the unsafe condition in the walk could be determined.—*McEnaney v. City of Butte*, 526.

Same—Snow and Ice—Duty to Remove.

19. The duty to keep its streets free from accumulations of ice and snow rests upon a municipality only when they imperil life or limb.
McEnaney v. City of Butte, 526.

Same—Injuries—Statutory Notice—Sufficiency.

20. The notice of the injury complained of, required by section 3289, Revised Codes, to be given defendant city, signed by the plaintiff, "by C. & K., her attorneys," was *prima facie* sufficient.—*McEnaney v. City of Butte*, 526.

CLERK OF DISTRICT COURT.

Entry of judgment by,—see Judgments, 1-3.

CONSENT.

To separation,—see Divorce, 2, 4, 6.

CONSTITUTION.

Jurisdiction of supreme court under,—see Supreme Court.

Judicial Officers—Police Judge—Impeachment.

1. Constitution, Article V, section 17, providing that the governor and other state and judicial officers, except justices of the peace, shall be liable to impeachment, is only applicable to constitutional officers, and does not cover a city police judge, whose office is statutory only.—*State ex rel. Working v. Mayor*, 61.

Same—Police Judges—Removal.

2. Revised Codes, section 3236, authorizing the city council to remove any officer on written charges after notice by a two-thirds vote of all the members elect, is in consonance with Constitution, Article V, section 18, subjecting officers not liable to impeachment to removal in the manner provided by law, and the statute is a proper exercise of the legislative authority granted, and a police judge of a city may be removed in a proper case by the city council.—*State ex rel. Working v. Mayor*, 61.

Mechanics' Liens—Attorneys' Fees—Unconstitutionality of Statute.

3. Section 7166, Revised Codes, allowing attorneys' fees to claimants of mechanics' liens, *held* unconstitutional.—*Mills v. Olsen*, 129.

Statutes—Validity—How Determined.

4. The validity of a statute is not to be determined by what has been, but by what may be, done under it.—*State ex rel. Holliday v. O'Leary*, 157.

Same—Who may Question Validity.

5. One to whom a statute denies a right which, in its absence, he would have, may raise the question of the constitutionality of the act.—*State ex rel. Holliday v. O'Leary*, 157.

Elections—Nominations to Judicial Office—Statute—Invalidity.

6. *Held*, under the rule that a statute which denies to the elector of the state, or any part of it, the right to nominate candidates for public office is void as violative of the Bill of Rights (Const., Art. III, secs. 5, 26), that Chapter 113, Laws of 1909, providing for nonpartisan nomination to judicial office, by petition, is invalid because incapable of being made to operate uniformly throughout the state, in that it fails to provide any means by which a candidate for judicial office may be nominated in a newly created municipality, or for a newly created judicial office, or for judicial office in a district the boundaries of which have been changed since the last election or may be changed hereafter.—*State ex rel. Holliday v. O'Leary*, 157.

Same—Statute—Defective Title.

7. Chapter 113, Laws of 1909, *held*, unconstitutional for the further reason that its title does not clearly express the purpose of the statute, as required by section 23, Article IV of the Constitution.—*State ex rel. Holliday v. O'Leary*, 157.

Lincoln County—Permanent Location of County Seat—Special Law—Unconstitutionality.

8. *Held*, under section 26, Article V, of the Constitution, that the legislature may not, in a special Act, creating a county, refer the location of its permanent county seat to a vote of the people of the county, but can do so only by a general law of uniform operation throughout the state; and that, therefore, that portion of the Act creating Lincoln County (Laws of 1909, Chapter 133, sec. 2), making it incumbent upon the county commissioners to submit the permanent location of the county seat to a vote of the electors, offends against the special and local law clause of the Constitution, *supra*, and is void.—*State ex rel. Geiger v. Long*, 415.

Special Laws—Prohibition Absolute.

9. The prohibition against the enactment of local or special laws, in section 26, Article V, of the Constitution is absolute.—*State ex rel. Geiger v. Long*, 415.

CONSTITUTION OF MONTANA.

(List of Sections Cited or Commented upon.)

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CONTRACTS.

Contracts of carriage,—see Railroads, 1-9.

Rescission—**Fraud**—**Complaint**—**Insufficiency**.

1. The complaint in an action to rescind a contract on the ground of fraud, from which the date when plaintiff discovered the facts upon which he relied for rescission could not be ascertained was vulnerable to a special demurrer because ambiguous, unintelligible and uncertain.—*Ott v. Pace*, 82.

Same—**Effect of Fraud**.

2. Fraud in the inducement of a contract does not render it absolutely void, but only voidable at the option of the person defrauded.—*Ott v. Pace*, 82.

Same—**Fraud**—**Affirmance**—**Delay**.

3. Where plaintiff after having been in possession of ranch property for about one year, under a contract of sale, entered into a substitute agreement which in terms annulled the former one and under which he gained additional advantages in the matter of making deferred payments, remained in possession for another period of eighteen months, made payment of a delinquent installment on the purchase price, harvested and sold crops, knowing at the time he made the second contract that he had been induced to enter into the original one through fraud on the part of defendants, he will be held to have elected to affirm the alleged fraudulent transaction, thus precluding his right to rescind.—*Ott v. Pace*, 82.

Same—**Substitution of New Contract**—**Waiver of Fraud**.

4. By agreeing to the substitution of a new contract for one deemed by him to have been fraudulent, plaintiff waived the fraud which entered into the execution of the former one.—*Ott v. Pace*, 82.

Same—**Duress**—**What Does not Constitute**.

5. Threats to enforce payment of promissory notes in the manner provided in a contract of sale in case of nonpayment do not constitute duress.—*Ott v. Pace*, 82.

Same—**Fraudulent Representations**—**What are not**.

6. Alleged false representations, to the effect that the proceeds from the sale of crops would meet deferred payments on a ranch, that those on the premises at the time of the sale were of a certain quality and value, and that the soil was rich and productive, were mere expressions of opinion, which, in the absence of special circumstances pleaded, tending to give them a different character, were not sufficient to constitute actionable fraud.—*Ott v. Pace*, 82.

Same—**Laches**.

7. Plaintiff's right to rescind on the ground of fraud held to have been barred by laches.—*Ott v. Pace*, 82.

Master and Servant—**Action for Wages Due**—**Evidence**—**Admissibility**.

8. In an action to recover for services rendered under an oral agreement, the terms of compensation as fixed in which were controverted, evidence showing the income derived from defendant's business was improperly excluded. It was admissible as bearing upon the question of the probability or improbability of the agreement having been made as claimed by plaintiff.—*Albertini v. Linden*, 126.

Lease and Bond—**When One Agreement**.

9. A lease and contract to sell, contained in one writing, may constitute separate agreements, if their provisions are independent of each other; where, however, the provisions are interdependent, the instrument must be deemed an entity.—*Snider v. Yarbrough*, 203.

Option Contract—Definition.

10. An option is a right acquired by contract to accept or reject a present offer within a limited or reasonable time in the future.—*Snider v. Yarbrough*, 203.

Same—Time—Essence of Agreement.

11. The clause in an option contract that "time is of the essence of this agreement," held to have applied to the entire instrument and not to any particular paragraph thereof.—*Snider v. Yarbrough*, 203.

Same—Strict Construction.

12. Option contracts relating to mining claims, a character of property which is subject to violent fluctuations in value, are strictly construed, and time is deemed to be of the essence thereof.—*Snider v. Yarbrough*, 203.

Same—Mining—Lease and Bond—Rights of Lessor.

13. Plaintiff and defendant entered into a written contract by the terms of which the latter leased to the former a quartz lode claim with an option to purchase, payment of installments to be made at given dates, the agreement to convey to be void if the lessee should fail to pay the full purchase price on or before a certain day, "time being of the essence of this agreement." Plaintiff made the initial payment, and, failing to pay the second installment on time, secured an extension but again defaulted. Held, that defendant, electing to treat the agreement at an end, had a right to re-enter, take possession and relet the property to others.—*Snider v. Yarbrough*, 203.

Building Contracts—Actions for Breach—Pleading—Allegations as to Certificate of Architects.

14. Where a complaint, in an action on a building contract brought by the contractors, alleged performance of the contract according to its terms, and that the architects' certificate, authorizing final payment, had been demanded, and that it was refused for no fault of plaintiffs, but because of a suit begun against the architects by the defendants, it is sufficiently shown that the certificate was withheld arbitrarily, or for a cause over which the plaintiffs had no control, and such showing is all that is necessary.—*Piper v. Murray*, 230.

Same—Extra Work—Necessity of Order.

15. Where a building contract provides that no extra charges shall be made unless there shall be an order in writing fixing the price, there can be no charges for extra work, whether alterations in the plan of doing the work, or additions in and about the building, unless the order or certificate has first been made.—*Piper v. Murray*, 230.

Same—Actions for Breach—Evidence—Presumption.

16. In an action on a building contract, the terms of which provide that nothing was to be considered an extra unless agreed upon in writing, and in which no writing is produced, there is a presumption, in the absence of writing, that there were no extras.—*Piper v. Murray*, 230.

Same—Parol Evidence Modifying Written Contract.

17. Where plaintiff, without pleading or showing any modification or waiver of the terms of the contract, was permitted to testify that the plans and specifications had been changed, and that extras had been agreed upon in writing, and to state the total amount of such extras without producing any agreements in writing, the effect of this testimony was to erroneously modify a written contract by parol evidence.—*Piper v. Murray*, 230.

Same—Extras—Burden of Proof.

18. In an action on a building contract for compensation, by the terms of which there was to be no change of the specifications and no extra work unless agreed upon in writing, the burden of showing that there were extras to which payments made under the contract might be applied was on the plaintiff.—*Piper v. Murray*, 230.

Same—Substantial Performance of Building Contract—Evidence.

19. Where one of the plaintiffs, in an action to recover a balance on a building contract, gave testimony showing that he was an expert on contract work, he was properly allowed to testify that he constructed the building, furnished the materials, and performed the work in general conformity with the plans and specifications.—*Piper v. Murray*, 230.

Same—Opinion Evidence—Cross-examination of Expert.

20. Where an expert on contract work was called in a contractors' action for a balance alleged to be due under a written contract, and testified as to the fact of certain cracks in the concrete upon the building, he could not properly be asked on cross-examination where he would place the blame therefor, or whose duty it was to provide for expansion and contraction of the cement work.—*Piper v. Murray*, 230.

Same—Opinion Evidence—Conclusion of Witness.

21. In an action by contractors upon a building contract in which there was evidence of substantial performance, a question to a witness, who had made an inspection of the building, and testified to certain defects in construction, whether in his opinion, as a practical builder, the contractors were entitled to receive, or the architects entitled to give, a final certificate of the work according to the plans and specifications, was properly excluded as calling for a conclusion of the witness, which was for the architects under the contract, and ultimately for the jury.—*Piper v. Murray*, 230.

Discretion of Trial Court—Permitting Jury to Inspect Building.

22. The matter of allowing the jury, in an action on a building contract, to inspect the building many months after its alleged completion, was within the sound legal discretion of the trial court, which will not be reviewed unless an abuse is shown.—*Piper v. Murray*, 230.

Performance to Satisfaction of Party—Evidence—Sufficiency.

23. Evidence in an action to recover on an alleged oral promise to pay plaintiff for information relative to a vein of ore in defendant's quartz claim, knowledge of the existence of which was gained by the former while working in an adjoining property, if such information prove satisfactory to promisor, held sufficient to go to the jury upon the question whether the agreement was made as alleged.—*McCrimmon v. Murray*, 457.

Same—Construction.

24. Whether the information sought by defendant was satisfactory to him was a matter exclusively for his own judgment, exercised honestly and in good faith, his good or bad faith to be inferred from his declarations and conduct subsequent to an examination of the premises made by him, and the value of the information.—*McCrimmon v. Murray*, 457.

Interpretation—Office of Court.

25. In adjudicating rights under a contract, a court's only office is to enforce such rights as fixed by their own agreement; it cannot make a contract for them and determine their respective rights accordingly.—*McCrimmon v. Murray*, 457.

Instructions Inapplicable to Issues—Error.

26. The principal issue presented by the pleadings was whether defendant had agreed to pay plaintiff a certain sum, provided the information claimed by the latter to be in his possession should prove *satisfactory* to the former; there was sufficient evidence to go to the jury on this point. While some testimony was admitted that the information was valueless, in other instances such evidence was excluded as immaterial. The court in its instructions charged the jury that defendant was liable if the information was proved to have been *valuable*. *Held*, error as submitting the case upon an issue outside the pleadings.—*McCrimmon v. Murray*, 457.

Evidence—Declarations of Party—*Res Gestae*.

27. What defendant said and did while engaged in making an examination of the underground workings in his claim to determine the character and value of the vein to which the information, claimed to have been given him by plaintiff, related, was competent to be elicited from a witness who accompanied him on his tour of inspection; the evidence tended to show the state of defendant's mind produced by his observations and was part of the *res gestae*.—*McCrimmon v. Murray*, 457.

Logging—Streams—Negligent Driving—Liability—Independent Contractors.

28. The contention of defendant company that the person who had contracted to drive its logs was an independent contractor, and that, therefore, he, and not itself, was responsible for any damage caused by the logs becoming jammed and the consequent overflow of the stream, was without merit, it appearing that under the agreement the contractor was required to conduct the drive in a certain manner, defendant refusing to give him permission, during the drive, to do it in such a way as to avoid the flooding of adjacent lands.—*Eeraert v. Eureka Lumber Co.*, 517.

Cancellation—Real Property—Complaint—Promissory Notes—Tender—Sufficiency.

29. In a suit to cancel a contract of sale of real property because of breaches thereof by the vendee, the complaint which alleged that the notes evidencing deferred payments were brought into court for cancellation and return to defendant, was sufficient as against the objection that tender thereof had not been made before commencement of suit.—*Arnold v. Fraser*, 540.

Same—Encumbrances—Complaint—Sufficiency.

30. An allegation that the land mentioned in a contract of sale was free from encumbrances and that plaintiffs were able to convey title was unnecessary in a suit by the vendor seeking cancellation because of breaches of its provisions by the vendee.—*Arnold v. Fraser*, 540.

Same—Tender—Complaint—Sufficiency.

31. Assuming (but not deciding) that it was necessary for plaintiffs to allege that they had tendered to defendant all moneys paid by him under the contract of sale, the requirement of the law that defendant shall first be placed in *statu quo* was met by an allegation that he had the use of the premises from the date of the contract to the commencement of suit, and that the rental value of the property exceeded the amounts paid by defendant to or for the use of plaintiffs.—*Arnold v. Fraser*, 540.

Same—Default of Vendee—Mortgages.

32. *Held*, that a contract of sale which, among other things, provided that time should be of the essence of it; that the vendors

could at their option terminate it for failure on the part of the vendee to comply strictly with its terms, and that upon such termination the property involved and all payments made by the vendee should be the property of the vendors, and the vendee should not have any action to recover, was not a mortgage.—Arnold v. Fraser, 540.

Same—Default by Vendee—Tenancy.

33. In the absence of a provision in a contract of sale of real property, for the creation of a tenancy in case of default by the vendee, further occupancy of the premises by him will not be deemed to have been under an implied agreement permitting him to hold as tenant.—Arnold v. Fraser, 540.

Same—Improper Counterclaims.

34. Allegations that plaintiffs orally represented to defendant that the land sold to him comprised a larger acreage than he actually received, and that having executed the contract of sale in reliance on such false representations, he was entitled to be given credit for a certain amount because of such deficiency in the quantity of land, held, not to have constituted counterclaims in suit to cancel the contract because of defendant's failure to carry out its provisions.—Arnold v. Fraser, 540.

Same—Oral Agreements Merged in Written Contract.

35. A written contract supersedes any oral negotiations theretofore had relative to the subject matter of it, and must be considered as containing all of its terms agreed upon at the time it was executed. Arnold v. Fraser, 540.

Same—Improper Counterclaims.

36. That defendant, relying upon plaintiffs' false statements that the ditches upon the lands purchased by him from them were in proper condition to carry and distribute water, suffered loss by damage to his crops, and was put to expense for repairs, did not constitute counterclaims in a suit to cancel the contract of sale.—Arnold v. Fraser, 540.

CONTRIBUTORY NEGLIGENCE.

See Personal Injuries, 10, 15, 16, 18, 34, 39, 40, 46, 47.

CORPORATIONS.

See, also, Agency; Municipal Corporations.

Electricity—Duty of Corporation to Furnish—When.

1. A corporation authorized under a franchise to furnish electricity, gas or the like to the inhabitants of a city may be compelled to furnish it to all persons along its lines who offer to, and do, comply with its reasonable rules and regulations.—State ex rel. Deeney v. Butte Electric & P. Co., 118.

Same—Refusal to Furnish—Rules—Reasonableness.

2. A rule of a public service corporation that one who fails or refuses to pay the price of the commodity furnished when due may be refused further service, is reasonable.—State ex rel. Deeney v. Butte Electric & P. Co., 118.

Same—Refusal to Furnish—Rules—Theft of Gas—*Mandamus*.

3. Where the answer of defendant company in a proceeding in *mandamus* to compel it to furnish electricity to relator failed to allege that it also had a gas franchise, a rule that it would not furnish electricity to one who had stolen gas from its mains until all reasonable bills therefor had been paid was not one which it had a

right under its electricity franchise to adopt in protection of its gas business, and was therefore no defense to its refusal to supply relator with electric light.—*State ex rel. Deeney v. Butte Electric & P. Co.*, 118.

Proof of Corporate Existence—Statutes.

4. Chapter 94, Laws of 1909, providing that the certificate of incorporation of companies issued by the secretary of state shall be *prima facie* evidence of their corporate character and capacity, *held* not to apply to corporations organized before the adoption of the Codes of 1895, prior to which time provision for such certificate had not been made.—*Billings Realty Co. v. Big Ditch Co.*, 251.

Stockholders—Agency—Instructions.

5. Whether a stockholder is or is not the agent of the corporation depends upon the facts of the particular case; therefore the refusal of an unqualified instruction that he is not such agent was properly refused.—*Billings Realty Co. v. Big Ditch Co.*, 251.

Irrigation Canals—Negligence in Operation—Liability of Corporation—Negligence of Agents.

6. A corporation organized to furnish water to its stockholders for irrigation and domestic purposes was not an insurer and could be held liable in damages only for negligence of its agents—not for that of trespassers—which negligence will not be presumed, but must be pleaded and proved.—*Billings Realty Co. v. Big Ditch Co.*, 251.

Same—Negligence of Stockholders—Agency—Liability of Corporation.

7. Evidence *held* to show that defendant company had constituted its stockholders its agents in the management of its canal, by permitting them, whenever they wanted water on their premises, to so manipulate the headgate as to cause the water to run in the desired direction; *held* further that therefore the company was liable for any damage through flooding occasioned by their negligence in taking water from the canal.—*Billings Realty Co. v. Big Ditch Co.*, 251.

Capacity to Sue—Pleading.

8. An allegation that a defendant was a corporation was sufficient to show its capacity to be sued.—*Storer v. Graham*, 344.

Transfer of Stock—Refusal—Equity.

9. Where the officers of a corporation wrongfully refuse to recognize and register a valid transfer of stock, and issue a new certificate to the transferee, the party aggrieved may invoke the aid of a court of equity.—*Fitzpatrick v. O'Neill*, 552.

Same—Promoters—Issuance of Stock for Services—Legality of Act.

10. Where all the holders of corporate stock had knowledge that a certain number of shares were to be issued to the promoters of the company (who were already stockholders and president and secretary, respectively, of the company) for their services in its organization, and agreed that the amount so to be paid was reasonable and none were misled or deceived, the corporation could legally issue the stock.—*Fitzpatrick v. O'Neill*, 552.

Same—Issuance of Stock—Action by Board of Directors not Indispensable—Presumptions.

11. Though, under section 3833, Revised Codes, the corporate powers, business and property of domestic corporations must be exercised, conducted and controlled by a board of directors, formal action on its part may, even on important matters, be dispensed with where all the shareholders and directors are present and concur in the action taken. In such a case the board will be presumed to have ratified it, although

it in fact did not act affirmatively in the matter.—*Fitzpatrick v. O'Neill*, 552.

Same—Presumptions.

12. *Held*, under the rule stated in paragraph 11, *supra*, that the action of the stockholders in a corporation at a meeting at which every outstanding share of stock was duly represented and voted in favor of the issuance of a certain number of shares to the promoters of the company in payment for their services, a majority of the directors being present and assenting, will be deemed to have been ratified by the board of directors, especially in view of the fact that the stock so issued was subsequently twice voted without objection at stockholders' meetings at which the remaining directors were present.—*Fitzpatrick v. O'Neill*, 552.

Same—Cancellation of Stock—When Nullity.

13. An attempt to cancel certificates representing corporate stock legally issued upon a sufficient consideration is a nullity.—*Fitzpatrick v. O'Neill*, 552.

Same—Coming into Equity “With Clean Hands.”

14. The trial court having found all the issues in favor of plaintiff in a suit to compel the officers of a corporation to transfer to him on the books of the company certain shares of its capital stock and issue a new certificate to the transferee, the contention that he was not invoking the aid of a court of equity “with clean hands,” *held* without merit.—*Fitzpatrick v. O'Neill*, 552.

COSTS.

Mileage of Witnesses.

1. The mileage of his witnesses which a successful party to an action may recover, under sections 3182 and 7169, Revised Codes, is not limited to travel from and to their place of residence. (*Expression contra*, in *McGlaughlin v. Wormser*, 28 Mont. 177, 72 Pac. 428, held inadvertently made.)—*Lynes v. Northern Pac. Ry. Co.*, 317.

COUNTERCLAIMS.

Improper,—see Contracts, 34, 36.

COUNTIES.

New Counties—County Seats—Legislature—Implied Powers.

1. The legislature having the power to create new counties by special Act (*Holiday v. Sweet Grass County*, 19 Mont. 364, 48 Pac. 553), authority to do all things incidental to a complete exercise of such power is implied.—*State ex rel. Geiger v. Long*, 401.

Same—County Seats—Permanent Location—Mode Permissible.

2. One of the powers necessarily incidental to the complete creation of a new county is that of designating a county seat, which power may be exercised by locating a permanent county seat in the Act creating the county, or by naming a temporary or provisional place and leaving the question of the permanent location of the seat of government to the people of the county for decision. (See opinion on rehearing, p. 415.)—*State ex rel. Geiger v. Long*, 401.

Same—“Changing” and “Removing” County Seats.

3. The words “changing” and “removing” found in the Constitution and the statute laws having to do with county seats, refer to the act of changing or removing a county seat which has been definitely located, and not to a temporary or provisional one.—*State ex rel. Geiger v. Long*, 401.

Lincoln County—Permanent County Seat—Location—Constitutionality of Act.

4. Held, that that portion of the Act creating Lincoln county (Laws of 1909, Chapter 133) providing, after designating the town of Libby as the county seat, that the people of said county should definitely fix the county seat by means of an election, was not unconstitutional as conflicting with the provisions of section 26, Article V, of the Constitution, that "the legislative assembly shall not pass local or special laws * * * locating or changing county seats." (For holding *contra*, see opinion on rehearing, p. 415.)—State ex rel. Geiger v. Long, 401.

Same—Permanent Location of County Seat—Special Law—Unconstitutionality.

5. Held, under section 26, Article V, of the Constitution, that the legislature may not, in a special Act, creating a county, refer the location of its permanent county seat to a vote of the people of the county, but can do so only by a general law of uniform operation throughout the state; and that, therefore, that portion of the Act creating Lincoln County (Laws of 1909, Chapter 133, sec. 2), making it incumbent upon the county commissioners to submit the permanent location of the county seat to a vote of the electors, offends against the special and local law clause of the Constitution, *supra*, and is void.—State ex rel. Geiger v. Long, 415.

New Counties—Petition for Creation—Number of Signatures—Statutory Construction.

6. Held, that the requirement of section 2, Chapter 112, Laws of 1911 (having to do with the creation of new counties), that the petition therein provided for "shall be signed by at least one-half of the qualified electors of the proposed new county whose names appear on the official registration books" used at the last preceding general election, refers to those persons only who at the date of signing the petition were qualified electors; and that therefore defendant board of county commissioners, in arriving at the total number of electors, signatures of at least one-half of whom were necessary to move the board to order an election, erroneously counted those whose names might properly have been canceled by the registry agent under section 476, Revised Codes, because of death, removal, etc., since the last general election.—State ex rel. Bogy v. Board of County Commissioners, 533.

COUNTY ATTORNEYS.

What not misconduct,—see Criminal Law, 36.

CRIMINAL LAW.**Circumstantial Evidence—Conviction—Nature of Evidence Required.**

1. Where a conviction is sought upon circumstantial evidence, all the circumstances proved must be consistent with each other and with the hypothesis that the accused is guilty, and at the same time inconsistent with any other rational hypothesis.—State v. Suitor, 31.

Motive—Significance of Evidence.

2. While it is not indispensable that motive be shown before conviction for homicide can follow, if the facts otherwise tend to show the commission of the crime, its presence or absence is significant in the light of the facts of the particular case.—State v. Suitor, 31.

Admission of Guilt—What are not.

3. A statement made by defendant, after he had been informed of the evidence which had been gathered against him, that he expected to be

arrested upon a charge of murdering deceased, and one, made to the sheriff at the time of his arrest, that he thought the officer was looking for him, and doubting that the authorities had much evidence against him, held not to have been implied admissions of guilt under the circumstances of the case.—*State v. Suitar*, 31.

Murder—Conviction—Circumstantial Evidence—Insufficiency.

4. Held, that the circumstantial evidence upon which defendant was convicted of murder in the first degree did not exclude the hypothesis of his innocence, but only went so far as to induce the conclusion that he was probably guilty, and therefore was insufficient to justify a conviction.—*State v. Suitar*, 31.

Same—Information—Sufficiency.

5. An information stating that defendant unlawfully, feloniously, willfully, premeditatedly, deliberately and of his malice aforethought shot and killed E. M., a human being, sufficiently charged murder.—*State v. Crean*, 47.

Manslaughter—Information—Sufficiency.

6. Held, that the information referred to in paragraph 5 above, when stripped of the terms conveying the idea of deliberation, premeditation and malice, sufficiently charged manslaughter, and that therefore the jury could properly find accused guilty of the lesser offense, under section 9326, Revised Codes.—*State v. Crean*, 47.

Homicide—Pleading and Proof—Variance—Surplusage.

7. The information charged that defendant shot the deceased, and that the latter died, in J. county. The evidence disclosed that while the shooting occurred in J. county, the deceased died in a neighboring one. Held, that the jurisdiction of the offense having been properly laid in J. county (Rev. Codes, sec. 9020), it was unnecessary to allege or prove that deceased died in that county; that such allegation was surplusage, and that, therefore, there was not any variance.—*State v. Crean*, 47.

Variance—What Constitutes.

8. A variance in criminal law refers to a disagreement between the allegations in the information and the proof, with reference to some matter which is legally essential to the charge.—*State v. Crean*, 47.

Reasonable Doubt—Correct Instruction.

9. An instruction on the question of reasonable doubt, substantially the same as that approved in *Territory v. McAndrews*, 3 Mont. 158, held not open to objection.—*State v. Crean*, 47.

Same—Instructions.

10. The paragraph in an instruction on reasonable doubt, that "a juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjecture, as to a possible state of facts different from that established," held simply an admonition that jurors could not go outside of the evidence introduced, in search of something upon which to base a reasonable doubt of defendant's guilt, and not to have been prejudicial to him.—*State v. Crean*, 47.

Homicide—Justification—Burden of Proof—Correct Instruction.

11. Where the commission of the homicide by the defendant was proved, the evidence on the part of the prosecution tending to show that the killing constituted murder, and the defense was that the killing was justifiable, an instruction that the burden of proving circumstances of justification lay upon defendant, the *quantum* of proof thus imposed upon him being only such, however, as upon the whole case would raise a reasonable doubt of his guilt, was correct.—*State v. Crean*, 47.

Same—Instructions—Presumption of Innocence.

12. Under the rule that the refusal of an instruction is not error if the substance thereof was given in other paragraphs of the charge, the court's refusal of a tendered instruction that the presumption of innocence is a fundamental and important part of the law of the land, and should not at any stage of the trial be ignored, *etc.*, was not erroneous. *State v. Crean*, 47.

Same—Dying Declarations—Preliminary Proof—Presence of Jury—Discretion.

13. Whether the trial court should or should not excuse the jury during the preliminary inquiry touching the admissibility of a dying declaration in evidence was a matter within its sound discretion, and in the absence of any showing of abuse thereof its ruling will not be disturbed on appeal.—*State v. Crean*, 47.

Same—Dying Declarations—Preliminary Proof—Sufficiency.

14. It is not necessary to the introduction of a dying declaration that it be first shown that the declarant was *in extremis*, by evidence independently of the declaration itself; it is sufficient if the evidence, whether given by the declarant or others, shows that it was made under a sense of impending death.—*State v. Crean*, 47.

Same—Dying Declarations—Admissibility.

15. Statements of deceased in his dying declaration that the shooting was without provocation, that there was not any trouble between him and defendant, and that the declarant was not armed at the time he was shot, were not objectionable as conclusions, opinions or mere matters of belief, but were admissible in evidence as a part of the *res gestae*.—*State v. Crean*, 47.

Homicide—Manslaughter—Theory of Case—Appeal.

16. Defendant was charged with murder in the first degree and convicted of manslaughter. He acquiesced in the theory of the case that there was evidence upon which a verdict of manslaughter might be predicated, and did not object to instructions defining manslaughter and distinguishing it from murder, and telling the jury, *inter alia*, that they might find defendant guilty of murder in either of its degrees, or manslaughter, *etc.* Held, that he was not in any position to complain that the jury did not find him guilty of a more serious offense, but was bound by the theory upon which the case was tried.—*State v. Crean*, 47.

Appeal—Extent of Review.

17. The supreme court will not interfere with a judgment of the district court in a criminal cause, unless the substantial rights of the defendant were prejudicially affected.—*State v. Crean*, 47.

Gaming—Information—Sufficiency.

18. An information alleging that accused operated and ran a game of studhorse poker, a game of chance played with cards for money, charges a violation of Revised Codes, section 8416, punishing any person operating or running, as principal, agent, or employee, any game of studhorse poker, the allegation showing that accused was not a player, but was the proprietor, or agent, or employee in charge.—*State v. Wakely*, 427.

Exclusion of Evidence—Harmless Error.

19. Where a detective, testifying for the state, stated on cross-examination that he worked for \$75 a month and expenses, the refusal to allow him to further state whether he worked for a salary or on a commission was not prejudicial to accused.—*State v. Wakely*, 427.

Same.

20. Where a detective, testifying for the state on a trial for gambling, stated on cross-examination that he was brought to a town by the county attorney to look up gamblers, the refusal to allow him to answer the further question as to what brought him was not prejudicial to accused.—*State v. Wakely*, 427.

Same.

21. Refusal to allow a detective, testifying for the state, to testify on cross-examination as to the street and number of his residence in a distant city, or as to what his occupation was before he entered the employ of a detective agency, was not prejudicial to accused.—*State v. Wakely*, 427.

Same—Impeachment of Knowledge.

21a. Where a detective for the state, on a trial for operating games of chance, testified that he was familiar with the games, that he had seen them played, but had never played them, it was immaterial to inquire how he gained his knowledge of such games.—*State v. Wakely*, 427.

Same—Exclusion of Evidence—Harmless Error.

22. Where, on a trial for gaming, the evidence showed that two detectives testified for the state, the refusal to allow one of them to state on cross-examination what sign he employed to convey the information to the other that the cards were marked, was not prejudicial to accused, the question merely testing the credibility of the detective.—*State v. Wakely*, 427.

Same—Witnesses—Interest in Litigation.

23. The interest a detective who testifies for the state has in the result of the prosecution is material, and it is proper to ask him whether he is employed on a salary or a commission, and thus to show that his testimony may be influenced by the fact that he will receive extra compensation for testimony securing a conviction.—*State v. Wakely*, 427.

Same—Cross-examination.

24. Where a detective, testifying for the state, stated on cross-examination that the money received from a third person was paid to a detective agency from which he received his compensation, the sustaining of objections to questions, "How much did you draw from [third persons]?" Did you turn it into the agency or did you keep it?" was not error.—*State v. Wakely*, 427.

Same—Cross-examination—Latitude.

25. The trial court should allow the utmost latitude in the cross-examination of detectives testifying for the state, and thereby enable the jury to determine the credit to be given to them.—*State v. Wakely*, 427.

Same—New Trial—Misconduct of Jurors.

26. That jurors, during their deliberations, examined a court calendar in the jury-room and discovered that there were two criminal cases against accused for the same offense, and that the argument was advanced by jurors that accused must be guilty because of the two cases, may not be shown by affidavits of jurors, within Revised Codes, section 9350, subdivision 4, authorizing a new trial when the verdict has been decided by lot, or by any means other than a fair expression of opinion of all the jurors; but the misconduct is within subdivision 2, authorizing a new trial when the jury received out of court any evidence, other than that resulting from a view of the premises, and cannot be shown by the jurors themselves.—*State v. Wakely*, 427.

Same—"Accomplices"—Who are.

27. Under the rule that an accomplice must unite in the commission of the crime and must be an associate therein, one participating in a gambling game operated by another in violation of Revised Codes, section 8416, is not guilty of any offense, and, therefore, is not an accomplice within section 9290, providing that a conviction cannot be had on the testimony of an accomplice, unless corroborated.—*State v. Wakely*, 427.

Same—Appeal—Invited Error.

28. Accused, bringing out for the first time a matter on cross-examination, may not ask that the testimony be stricken out.—*State v. Wakely*, 427.

Same—Weight of Evidence—Question for Jury.

29. Where a witness testified to a conversation with a bartender of accused, and stated that accused was close enough to hear the conversation, and the witness subsequently stated that he did not talk loud enough to enable accused to hear him, the weight of his testimony on the subject was for the jury, and a motion to strike out the testimony on the ground that accused did not hear the conversation was properly denied.—*State v. Wakely*, 427.

Gaming—Evidence—Admissibility.

30. On a trial for operating a game of chance, the propriety of allowing a state's witness to testify as to who put up the most money, who lost the most, and who won the most, was within the court's discretion.—*State v. Wakely*, 427.

Criminal Law—New Trial—Newly Discovered Evidence—Diligence.

31. An application for a new trial on the ground of newly discovered evidence was properly denied, in the absence of any showing that the presence of the witness was not procurable at the trial at the time a state's witness first mentioned his name, or that any effort had been made to secure the testimony of such witness.—*State v. Wakely*, 427.

Rape—What does not Constitute.

32. The gist of the offense of rape as defined in subdivision 3 of section 8336, Revised Codes, is the use of force by the perpetrator overcoming the physical resistance offered by the female; hence if there be consent, however reluctantly given and even though accompanied by verbal protests and refusals, at any time during the act of intercourse, the act is not accomplished by force within the meaning of the statute, and does not constitute rape.—*State v. Needy*, 442.

Same—Evidence—Insufficiency.

33. Evidence held insufficient to justify a conviction for rape charged to have been accomplished by violence and force, but rather to show that the prosecuting witness failed to offer any physical resistance which it required force to overcome within the meaning of subdivision 3 of section 8336, Revised Codes.—*State v. Needy*, 442.

Extent of Proper Cross-examination.

34. Cross-examination may extend not only to all matters stated in the witness' original examination, but to all others, either directly or indirectly connected with them, which tend to enlighten the jury upon the question at issue.—*State v. Barrett*, 502.

Cross-examination—Harmless Error.

35. Action of the court in permitting a witness for defendant, on trial for crime, to answer certain questions on cross-examination over objection, if error, held to have been harmless.—*State v. Barrett*, 502.

Trial—County Attorneys—What not Misconduct.

36. The mere asking of questions of defendant's witnesses, objections to which were sustained, did not constitute such misconduct on the part of the prosecuting attorney as to warrant the granting of a new trial, where the record failed to disclose that he thereafter persisted in so doing knowing that the questions were improper.—*State v. Barrett*, 502.

Same—Curing Error.

37. If error was properly predicable upon the mere asking of the questions referred to in paragraph 36, above, it was cured by the court's admonition to the jury to disregard them.—*State v. Barrett*, 502.

Defenses—Alibi—Proper Rebuttal.

38. Defendant and his witnesses having testified, in support of an *alibi* relied upon by him as a defense, that he was at a certain place the entire evening on which the alleged crime was committed, it was proper rebuttal for the state to show that he was seen elsewhere on the same evening.—*State v. Barrett*, 502.

CROSS-EXAMINATION.

See Evidence, 22, 26-35, 40.

CURING ERROR.

In pleading,—see Pleading and Practice, 17, 18.

Interrogation of witness,—see Criminal Law, 37.

CUSTOM.

Erroneous admission of evidence,—see Evidence, 21.

Claiming illegal mileage by officer,—see Cities and Towns, 14.

DAMAGES.

Mitigation of,—see Personal Injuries, 29.

Special damages,—see Pleading and Practice, 24.

DECLARATIONS.

See Evidence, 14, 15, 37, 38; see, also, Dying Declarations.

DEFENSES.

Custom pursued in violating statute, no defense,—see Cities and Towns, 14.

Improper motives in bringing charges of official wrongdoing,—see Cities and Towns, 15.

DEMURRER.**What Admitted by.**

1. The rule that by interposing a demurrer to an answer the pleader admits the truth of its allegations includes only facts properly pleaded, and does not extend to mere conclusions of law or inferences from facts not pleaded or conclusions drawn therefrom, even if alleged in the pleading.—*State ex. rel. Deeney v. Butte Electric & P. Co.*, 118.

Complaint—Indefiniteness—Waiver.

2. An objection to a complaint on the ground of indefiniteness is waived unless a special demurrer on that account is interposed.—

Billings Realty Co. v. Big Ditch Co., 251; Allen v. Bear Creek Coal Co., 269.

DEPOSITIONS.

When Inadmissible in Evidence.

1. A deposition taken to be used in a guardianship proceeding was improperly admitted in evidence in a contest involving the question whether the incompetent for whom a guardian was appointed, and who subsequently died of dementia, was sane or insane at the time he executed the will sought to be probated; neither the parties nor the subject matter were the same, hence the evidence was inadmissible under section 8010, Revised Codes.—*In re Murphy's Estate*, 353.

DESERTION.

See Divorce.

DETECTIVES.

Admissibility of evidence given by,—see Criminal Law, 19-25.

DISCRETION.

See, also, New Trial, 4, 7.

View of Premises by Jury.

1. The matter of allowing the jury, in an action on a building contract, to inspect the building many months after its alleged completion, was within the sound legal discretion of the trial court, which will not be reviewed unless an abuse is shown.—*Piper v. Murray*, 230.

Default Judgment—Vacation.

2. In determining whether in exercising a sound legal discretion a default judgment should be set aside, the allegations of the complaint and a proposed answer were properly considered.—*Stover v. Graham*, 344.

Same—Refusal to Vacate.

3. It was not an abuse of discretion to refuse to set aside a default judgment obtained through inexcusable neglect of defendant, no question of inadvertence or surprise being presented.—*Stover v. Graham*, 344.

DISMISSAL.

Of appeal from judgment, when,—see Appeal and Error, 17.

DISTRICT COURTS.

See, also, Discretion.

Railroads—Rules—Interpretation—When for Court.

1. Where the language of defendant company's rules relative to the operation of its trains under the block signal system was plain and its meaning apparent, it was the duty of the trial court to determine the meaning to be given them and not a matter to be submitted to the jury.—*Lynes v. Northern Pac. Ry. Co.*, 317.

DIVORCE.

Separation—Reconciliation—Intent—Evidence.

1. In a suit for divorce asked for on the ground of desertion, where plaintiff's wife, who had been living apart from him by mutual consent, refused to accept his invitation to again live with him, testimony as to his intentions with reference to the manner of living he proposed to furnish to defendant in case she returned, was competent

to show his good faith in his effort to bring about a reconciliation.—*Bordeaux v. Bordeaux*, 102.

Same—Consent—How Determined.

2. Consent to a separation need not be expressed in words; it may be implied from facts and circumstances occurring at the time it was initiated, as well as from subsequent acts and admissions of the parties.—*Bordeaux v. Bordeaux*, 102.

Same—Reconciliation—Refusal—Desertion.

3. Where a separation has once been established by mutual agreement, express or implied, it will be presumed to continue until one of the parties revokes consent and in good faith seeks reconciliation and restoration; whereupon the party rejecting the overtures thus made is guilty of desertion.—*Bordeaux v. Bordeaux*, 102.

Same—Consent—Exclusion of Evidence—Error.

4. In an action for divorce in which the issue was whether the parties had been living apart under a mutual agreement of separation, the exclusion of letters written by defendant wife shortly after the separation which showed that it was by consent was prejudicial error.—*Bordeaux v. Bordeaux*, 102.

Same—Reconciliation—Good Faith—Question of Fact.

5. Whether a letter written by plaintiff to defendant in a divorce action seeking a reconciliation was written in good faith or induced by threats, contained in one indited by the latter to the former to institute certain legal proceedings against him, was a question of fact.—*Bordeaux v. Bordeaux*, 102.

Same—Reconciliation—Desertion—Evidence.

6. Evidence in an action for divorce sought on the ground of desertion, where the parties had lived apart for some years, held, to show that the separation had been by mutual consent, that an offer of reconciliation made by plaintiff husband was made in good faith, that defendant capriciously rejected it, and that therefore she was guilty of desertion, under section 3650, Revised Codes, and plaintiff entitled to the relief asked.—*Bordeaux v. Bordeaux*, 102.

DURESS.

What Does not Constitute.

1. Threats to enforce payment of promissory notes in the manner provided in a contract of sale in case of nonpayment, do not constitute duress.—*Ott v. Pace*, 82.

DYING DECLARATIONS.

See Criminal Law, 13-15.

ELECTION OF REMEDIES.

Mistake—Estoppel.

1. Where plaintiff first brought his action for an accounting, alleging that he was a partner of defendant, and as evidence that some amount was due him pleaded and produced a certain note, but the court found that no partnership existed, and that the note was given as evidence of an indebtedness arising out of a contract of employment, defendant could not thereafter urge that plaintiff could not try the question whether anything was due under the contract of employment.—*O'Meara v. McDermott*, 189.

Same.

2. One who prosecutes a suit based on a remedial right which he erroneously supposes he has, and is defeated because of the error, has

not made a conclusive election, and is not precluded from prosecuting an action based on an inconsistent remedial right.—*O'Meara v. McDermott*, 189.

ELECTIONS.

Nonpartisan nominations to judicial office, statute held unconstitutional,—see Constitution, 6, 7.

Special,—see Cities and Towns, 1, 3.

ELECTRICITY.

Duty of public service corporation to furnish,—see Corporations, 1-3.

EQUITY.

Findings in equity cases conclusive, when,—see Appeal and Error, 8.

Findings of jury advisory,—see Findings, 1.

Evidence—Erroneous Admission—Presumptions.

1. In an equity action, though tried with a jury, it may be presumed that the judge in reaching the final conclusion disregarded incompetent and immaterial evidence, admitted over objection.—*Bordeaux v. Bordeaux*, 102.

Written Evidence—Erroneous Exclusion—Review on Appeal.

2. The supreme court will consider written evidence, erroneously excluded by the trial judge but incorporated in the record, as properly before it in finally disposing of an appeal in an equity case under the provisions of section 6253, Revised Codes.—*Bordeaux v. Bordeaux*, 102.

Equity Cases—Credibility of Witnesses—Review.

3. In a cause tried without a jury, the credibility of the witnesses is a matter exclusively for the trial court to determine.—*Orton v. Bender*, 263.

Transfer of Corporate Stock—Refusal.

4. Where the officers of a corporation wrongfully refuse to recognize a valid transfer of stock and issue a new certificate to the transferee, the party aggrieved may invoke the aid of a court of equity.—*Fitzpatrick v. O'Neill*, 552.

Same—Coming into Equity “With Clean Hands.”

5. The court having found all the issues in favor of plaintiff, the contention that he was not invoking the aid of a court of equity “with clean hands,” held without merit.—*Fitzpatrick v. O'Neill*, 552.

ESTATES OF DECEASED PERSONS.

Recovery of assets,—see Gifts.

ESTOPPEL.

See Cities and Towns, 10; Election of Remedies, 1, 2; Res Judicata, 1; Variance, 3.

EVIDENCE.

See, also, Declarations; Depositions; Dying Declarations.

Amended pleadings, admissibility,—see Pleading and Practice, 23.

Weight—Credibility of Witness—Disregarding Testimony.

1. Under Revised Codes, section 8028, paragraph 1, providing that the jury are to be instructed that their power of judging the effect of evidence must be exercised in subordination to the rules of evidence, juries

may not arbitrarily disregard testimony of unimpeached witnesses supported by all the circumstances in the case.—*Haddox v. Northern Pac. Ry. Co., &c.*

Circumstantial Evidence—Crime—Conviction—Nature of Evidence Required.

2. Where a conviction is sought upon circumstantial evidence, all the circumstances proved must be consistent with each other and with the hypothesis that the accused is guilty, and at the same time inconsistent with any other rational hypothesis.—*State v. Suitor, 31.*

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3. A statement made by defendant, after he had been informed of the evidence which had been gathered against him, that he expected to be arrested upon a charge of murdering deceased, and one, made to the sheriff at the time of his arrest, that he thought the officer was looking for him, and doubting that the authorities had much evidence against him, held not to have been implied admissions of guilt under the circumstances of the case.—*State v. Suitor, 31.*

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Hearsay Evidence—What Does not Constitute.

5. Where a witness could answer every question propounded to him of his own knowledge, and the value of his testimony did not depend in any degree upon the veracity or competency of any other person, his answers were not objectionable as hearsay.—*State v. Crean, 47.*

Judicial Notice.

6. The court will take judicial notice of the fact that a city arc-light will cast its rays further than 300 feet.—*Meehan v. Great Northern Ry. Co., 72.*

Exclusion—Harmless Error.

7. Error in the exclusion of evidence was harmless, where the same matter had theretofore been admitted or subsequently found its way into the record.—*Bordeaux v. Bordeaux, 102.*

Equity—Erroneous Admission—Presumptions.

8. In an equity suit, though tried with a jury, it may be presumed that the trial judge in reaching the final conclusion disregarded incompetent and immaterial evidence, admitted over objection.—*Bordeaux v. Bordeaux, 102.*

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Written Evidence—Erroneous Exclusion—Review on Appeal.

11. On appeal in an equity case written evidence erroneously excluded, but incorporated in the record, will be considered as properly before the supreme court in finally disposing of the appeal under section 6253, Revised Codes.—*Bordeaux v. Bordeaux*, 102.

Master and Servant—Action for Wages Due—Evidence—Admissibility.

12. In an action to recover for services rendered under an oral agreement, the terms of compensation as fixed in which were controverted, evidence showing the income derived from defendant's business was improperly excluded. It was admissible as bearing upon the question of the probability or improbability of the agreement having been made as claimed by plaintiff.—*Albertini v. Linden*, 126.

Offer of Proof—Purpose of—When Unnecessary to State.

13. Where competent evidence, offered but rejected, could have but one purpose, the fact that such purpose was not disclosed when the offer was made did not render the court's action justifiable.—*Albertini v. Linden*, 126.

Declarations—Admissibility in Evidence.

14. One who offers in evidence the declaration of a person through whom he traces his title to land must show (a) that it was made while the declarant was holding title; (b) that he was in fact the grantor of the party against whom the declaration is offered; and (c) that the declaration was against interest.—*Washoe Copper Co. v. Junila*, 178.

Same.

15. The declarations of a person while the owner of land may not be introduced in evidence either to sustain or destroy the record title.—*Washoe Copper Co. v. Junila*, 178.

Parol Evidence Modifying Written Contract.

16. Plaintiffs brought an action upon a building contract, by the terms of which nothing was to be considered an extra unless agreed upon in writing, before the doing of such extra work, and signed by the owner, the contractors, and certified by the architects. Without pleading or showing any modification or waiver of the terms of the contract, one of plaintiffs was permitted to testify that the plans and specifications had been changed, and that extras had been agreed upon in writing, and to state the total amount of such extras without producing any agreements in writing. *Held*, that the effect of this testimony was to erroneously modify a written contract by parol evidence.—*Piper v. Murray*, 230.

Expert Witness—Substantial Performance of Building Contract—Admissibility.

17. Where one of the plaintiffs, in an action to recover a balance on a building contract, gave testimony showing that he was an expert on contract work, he was properly allowed to testify that he constructed the building, furnished the materials, and performed the work in general conformity with the plans and specifications.—*Piper v. Murray*, 230.

Same—Improper Cross-examination.

18. Where an expert on contract work was called in a contractors' action for a balance alleged to be due under a written contract, and testified as to the fact of certain cracks in the concrete upon the building, he could not properly be asked on cross-examination where he would place the blame therefor, or whose duty it was to provide for expansion and contraction of the cement work.—*Piper v. Murray*, 230.

Same—Conclusion of Witness.

19. In an action by contractors upon a building contract in which there was evidence of substantial performance, a question to a witness, who had made an inspection of the building and testified to certain defects in construction, whether in his opinion, as a practical builder, the contractors were entitled to receive, or the architects entitled to give, a final certificate of the work according to the plans and specifications, was properly excluded as calling for a conclusion of the witness, which was for the architects under the contract, and ultimately for the jury.—*Piper v. Murray*, 230.

Equity Cases—Credibility of Witnesses—Review.

20. In a case tried without a jury, the credibility of the witnesses is a matter exclusively for the trial court to determine.—*Orton v. Bender*, 263.

Master and Servant—Coal Mines—Duty of Master—Custom—Evidence—Inadmissibility.

21. Though it was error to permit plaintiff's witnesses to testify that it is customary for coal mine operators to see that the places to which their employees are sent to work are first put in safe condition, it was nonprejudicial, the presumption being that the jury accepted the law as announced by the court: that it is incumbent upon the master to exercise ordinary care and diligence to provide his servant with a reasonably safe place in which to work,—rather than as stated by the witnesses.—*Allen v. Bear Creek Coal Co.*, 269.

Same—Improper Cross-examination—Mitigation of Damages.

22. The court properly sustained an objection to a question asked a physician on cross-examination, the purpose of which was, not to test the truth of a statement made by him on direct examination relative to the extent and character of plaintiff's injury, but to elicit evidence in mitigation of damages, to-wit, that he had offered to perform without charge the necessary surgical operation to restore plaintiff's hand to usefulness.—*Allen v. Bear Creek Coal Co.*, 269.

Same—Tables of Experiments—Admissibility.

23. Held, that tables showing the effect of experiments made by the manufacturer of the air-brakes with which plaintiff locomotive engineer's train was equipped, offered in evidence for the purpose of showing their available power to control the movements of trains of different tonnage under varying conditions, were admissible upon the same principle as are mortality tables, almanacs, market reports, etc.—*Lynes v. Northern Pac. Ry. Co.*, 317.

Hypothetical Questions—Contents.

24. A hypothetical question reciting a fact not shown by the evidence is improper.—*In re Murphy's Estate*, 353.

Will Contests—Insanity—Evidence—Immateriality.

25. Where the evidence in a contest involving the probate of a will tended to show that testator had been suffering from intermittent or occasional insanity, the question at issue was whether he was of sound mind at the time he executed the instrument; if so, evidence of his mental condition preceding and subsequent to its execution was immaterial.—*In re Murphy's Estate*, 353.

Cross-examination—Questions Assuming Facts.

26. A question asked a witness on cross-examination, which erroneously assumes that the witness has made a certain statement in his examination, was properly excluded.—*State v. Wakely*, 427.

Criminal Law—Harmless Error—Exclusion of Evidence.

27. Where a detective, testifying for the state, stated on cross-examination that he worked for \$75 a month and expenses, the refusal to

allow him to further state whether he worked for a salary or on a commission was not prejudicial to accused.—*State v. Wakely*, 427.

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Same.

29. Refusal to allow a detective, testifying for the state, to testify on cross-examination as to the street and number of his residence in a distant city, or as to what his occupation was before he entered the employ of a detective agency, was not prejudicial to accused.—*State v. Wakely*, 427.

Same—Impeachment of Knowledge.

30. Where a detective for the state, on a trial for operating games of chance, testified that he was familiar with the games, that he had seen them played, but had never played them, it was immaterial to inquire how he gained his knowledge of such games.—*State v. Wakely*, 427.

Same—Exclusion of Evidence—Harmless Error.

31. Where, on a trial for gaming, the evidence showed that two detectives testified for the state, the refusal to allow one of them to state on cross-examination what sign he employed to convey the information to the other that the cards were marked, was not prejudicial to accused, the question merely testing the credibility of the detective.—*State v. Wakely*, 427.

Same—Witnesses—Interest in Litigation.

32. The interest a detective who testifies for the state has in the result of the prosecution is material, and it is proper to ask him whether he is employed on a salary or a commission, and thus show that his testimony may be influenced by the fact that he will receive extra compensation for testimony securing a conviction.—*State v. Wakely*, 427.

Same—Cross-examination—Offer of Proof.

33. Where a detective, testifying for the state, stated on cross-examination that the money received from a third person was paid to a detective agency from which he received his compensation, the sustaining of objections to questions "How much did you draw from [third persons]?" Did you turn it into the agency or did you keep it?" was not error.—*State v. Wakely*, 427.

Same—Cross-examination—Latitude.

34. The trial court should allow the utmost latitude in the cross-examination of detectives testifying for the state, and thereby enable the jury to determine the credit to be given to them.—*State v. Wakely*, 427.

Same—Invited Error—Appeal.

35. A party who on cross-examination for the first time brings out a certain matter may not ask to have the testimony stricken.—*State v. Wakely*, 427.

Gaming—Evidence—Admissibility.

36. On a trial for operating a game of chance, the propriety of allowing a state's witness to testify as to who put up the most money, who lost the most, and who won the most was within the court's discretion.—*State v. Wakely*, 427.

Declaration of Party—Cautionary Instruction.

37. Held, that refusal to give an instruction, that "the oral admissions of a party are to be viewed with caution," was error.—*McCrimmon v. Murray*, 457.

Same—*Res Gestae*.

38. What defendant said and did while engaged in making an examination of the underground workings in his claim to determine the character and value of the vein to which the information, claimed to have been given him by plaintiff, related, was competent to be elicited from a witness who accompanied him on his tour of inspection; the evidence tended to show the state of defendant's mind produced by his observations and was part of the *res gestae*.—McCrimmon v Murray, 457.

Introduction of Mechanic's Lien in Evidence—When Unnecessary.

39. A party is required to prove only matters in issue; hence, where defendants admitted that plaintiff had perfected and filed "the alleged lien mentioned in plaintiff's complaint," the paper was before the court, and it was therefore not necessary to formally introduce it in evidence. Wertz v. Lamb, 477.

Cross-examination—Extent.

40. Cross-examination may extend not only to all matters stated in the witness' original examination, but to all others, either directly or indirectly connected with them, which tend to enlighten the jury upon the question at issue.—State v. Barrett, 502.

Criminal Law—Trial—County Attorneys—What not Misconduct.

41. The mere asking of questions of defendant's witnesses, objections to which were sustained, did not constitute such misconduct on the part of the prosecuting attorney as to warrant the granting of a new trial, where the record failed to disclose that he thereafter persisted in so doing knowing that the questions were improper.—State v. Barrett, 502.

Criminal Law—*Alibi*—Proper Rebuttal.

42. Defendant and his witnesses having testified, in support of an *alibi* relied upon by him as a defense, that he was at a certain place the entire evening on which the alleged crime was committed, it was proper rebuttal for the state to show that he was seen elsewhere on the same evening.—State v. Barrett, 502.

Written and Oral Contracts—Inadmissibility.

43. Evidence to prove an alleged oral agreement subsequently superseded by a written contract is inadmissible.—Arnold v. Fraser, 540.

Pleadings Before Amendment—Harmless Error.

44. The reception in evidence of a pleading as it was before amendment, held harmless.—Eeraert v. Eureka Lumber Co., 517.

EXCEPTIONS.

See Findings, 3.

See, also, Bills of Exception.

EXECUTION.**Sheriffs—Sale of Realty as Personal Property—Mining Machinery—Liability of Surety.**

1. In selling mining machinery under an execution as personal property, upon five days' notice only, instead of as real property on notice of twenty days, defendant sheriff violated the provision of section 6828, Revised Codes, and subjected himself and his surety to the penalty prescribed by section 6829.—Britannia Min. Co. v. United States F. & G. Co., 94.

Same—When Levy Unnecessary.

2. Mining machinery, being deemed affixed to the mine, is real property; a judgment becomes a lien upon it from the time it is docketed;

hence, after docketing of such judgment, a formal levy of execution was unnecessary to bring the property within the custody of the law. Britannia Min. Co. v. United States F. & G. Co., 94.

Supplementary Proceedings—Scope of Relief.

3. The property of a corporation could not be taken as the property of defendant in proceedings supplemental to execution, to which the corporation was not a party.—Bowlin Liquor Co. v. Fauver, 472.

Same—Motion.

4. A motion, in proceedings supplementary to execution, that personal property in the possession of a corporation and real property in the name of defendant's wife be declared the property of defendant and subject to execution was properly denied, where the personality in possession of the corporation was not subject to the execution; the court being under no duty to separate the two parts of the motion, and to refuse one and grant the other.—Bowlin Liquor Co. v. Fauver, 472.

Same—Review—Parties Entitled to Allege Error.

5. In proceedings supplemental to execution, the plaintiff was not aggrieved by an order, made at his request, authorizing him to bring suit against the defendant and others to recover property in the possession of the latter.—Bowlin Liquor Co. v. Fauver, 472.

EXPERT WITNESS.

See Evidence, 17-19.

FAILURE OF PROOF.

See Variance, 1.

FINDINGS.

Inconsistent,—see Wills, 2.

In equity cases conclusive, when,—see Appeal and Error, 8.

Equity—Office of Jury Advisory.

1. In an equity action tried by the court sitting with a jury, the office of the jury is advisory only; the judge may adopt or reject their findings or make others conforming to his own views of the evidence.—Bordeaux v. Bordeaux, 102.

Same—Duty of Court.

2. In a suit in equity, though tried with a jury, it is the duty of the judge under section 6763, Revised Codes, to make written findings upon all material issues of fact made by the pleadings, whether requested or not. This duty becomes imperative where timely request is made, and refusal constitutes reversible error.—Bordeaux v. Bordeaux, 102; Billings Realty Co. v. Big Ditch Co., 251.

Defective—Exceptions—Review.

3. A party who fails to make exception in the district court to findings claimed by him to be defective and to have the exception reserved in a bill of exceptions, may not complain of such defect on appeal.—Featherman v. Hennessy, 310.

To be Construed Together.

4. All findings of the court must be construed together, and, if possible, such construction given them as will sustain the decree; otherwise a general finding, when inconsistent with a specific one, must be rejected and the decree held to be supported by the latter. Featherman v. Hennessy, 310.

Conclusiveness—Trial Without Jury—Weight of Evidence—Question for Court.

5. In an action tried by the court without a jury, in which defendant's motion for judgment in his favor was granted, the question of the weight to be given to the testimony of plaintiff and his witnesses was one for the determination of that court, with which the appellate court will not interfere.—*Carpenter v. Nelson*, 565.

FIXTURES.

See Execution, 1, 2.

FRANCHISES.

See Taxation, 4, 5.

FRAUD.

See Contracts, 1-7, 36.

GAMING.

See Criminal Law, 18-31.

GAS.

Theft of, from public service corporation,—see Corporations, 3.

GIFTS.

Estates—Recovery of Assets—Action at Law.

1. Pleadings in an action brought by an executor to recover as assets of his testator's estate certain certificates of deposit, claimed by defendant as a gift *causa mortis*, held to have presented purely legal issues, and not such as were cognizable in a court of equity.—*O'Neil v. O'Neil*, 505.

Gifts *Causa Mortis*—Essentials.

2. To render a gift *causa mortis* effective the following elements must concur: (1) It must have been made in contemplation, fear or peril of death; (2) the donor must have died of the illness or peril which he then feared or contemplated; and (3) the delivery must have been made with the intent that title should vest only in case of death.—*O'Neil v. O'Neil*, 505.

Same—Validity—Burden of Proof.

3. The burden of proof rested upon defendant to show, *inter alia*, that the deceased delivered the certificates sought to be recovered as a part of his estate, as a gift and not merely as a deposit for safekeeping.—*O'Neil v. O'Neil*, 505.

Same—Certificate of Deposit—Indorsement.

4. Though indorsement of the certificates by deceased was not absolutely essential to the validity of the gift to defendant, delivery of such an instrument being sufficient to transfer the equitable title, the omission of this formality was a fact to be taken into consideration in determining whether deceased intended to transfer title.—*O'Neil v. O'Neil*, 505.

Same—Evidence—Sufficiency.

5. Evidence held sufficient to sustain the finding of the jury that delivery of the certificates of deposit, claimed by defendant as a gift *causa mortis*, was not intended by deceased as a transfer of title.—*O'Neil v. O'Neil*, 505.

Same—Validity—How Determinable.

6. The validity of a gift *causa mortis* is determinable by the law of the place where it is made, without reference to the domicile of the donor.—O'Neil v. O'Neil, 505.

Same—Law of Place—Evidence—Instructions.

7. The alleged gift having been made in the state of Minnesota, the trial court, for the purpose of ascertaining the law of that state relative to gifts *causa mortis*, admitted in evidence reported decisions of the supreme court of that state, and instructed the jury accordingly. The definition of such a gift made by the Minnesota appellate court is in conformity with the common law, embodied in section 4638, Revised Codes. *Held*, that appellant was not in a position to assert prejudicial error, either in the manner of ascertaining the law of Minnesota or in instructing the jury in accordance therewith.—O'Neil v. O'Neil, 505.

GOOD FAITH.

Question of fact,—see Divorce, 5.

Violation of statute by officer in, no defense,—see Cities and Towns, 14.

HARMLESS ERROR.

See Evidence, 7, 21, 27, 28, 29, 31, 44.

HEARSAY EVIDENCE.

See Evidence, 5.

HYPOTHETICAL QUESTIONS.

Contents,—see Evidence, 24.

IMPEACHMENT.

Provision of Constitution not applicable to police judges,—see Constitution, 1, 2.

INDEBTEDNESS.

See Cities and Towns, 1, 3.

INDEPENDENT CONTRACTOR.

See Personal Injuries, 33; Contracts, 28.

INDORSEMENT.

Of certificate of deposit, not indispensable to validity of gift,—see Gifts, 4.

INFANTS.

See Minors.

INJUNCTION.

Insufficient complaint,—see Cities and Towns, 3, 7, 10.

Original jurisdiction of supreme court,—see Supreme Court, 4, 5.

INSANITY.

See Wills, 1-9.

INSTRUCTIONS.

Minor Servants—Injuries—Warning—Correct Instruction.

1. Instruction charging jury relative to duty of master to warn minor servant of dangers, *held* correct.—*Kuphal v. Northern Pac. Ry. Co.*, 18.

Criminal Law—Reasonable Doubt—Correct Instruction.

2. An instruction on the question of reasonable doubt, substantially the same as that approved in *Territory v. McAndrews*, 3 Mont. 158, *held* not open to objection.—*State v. Crean*, 47.

Same—Reasonable Doubt—Prejudice.

3. The paragraph in an instruction on reasonable doubt, that "a juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjecture, as to a possible state of facts different from that established," *held* simply an admonition that jurors could not go outside of the evidence introduced, in search of something upon which to base a reasonable doubt of defendant's guilt, and not to have been prejudicial to him.—*State v. Crean*, 47.

Same—Presumption of Innocence.

4. Under the rule that the refusal of an instruction is not error, if the substance thereof was given in other paragraphs of the charge, the court's refusal of a tendered instruction that the presumption of innocence is a fundamental and important part of the law of the land, and should not at any stage of the trial be ignored, etc., was not erroneous. *State v. Crean*, 47.

Statutes—Violation by Master—Assumption of Risk—When Question not Involved.

5. The defense of assumption of risk is available to the master even though the negligence alleged was in violation of a duty imposed by statute; where, however, at the time of the injury of plaintiff's intestate he was so situated (in a deep mining shaft) as to have no choice of means of egress other than that provided by the master, and in the use of which he was killed (a mining cage from which the doors were missing, contrary to the provisions of section 8536, Revised Codes), he will be presumed to have submitted to its use from necessity, and therefore not to have assumed the attendant risk. The refusal of an instruction on that defense, under such circumstances, was not error.—*Monson v. La France Copper Co.*, 65.

Reading Instructions Together.

6. Instructions, which are correct when read in connection with other instructions, are not erroneous.—*Piper v. Murray*, 230.

Refusal—Settlement—Objection and Exception—Statutory Provisions.

7. The provision of section 6746, Revised Codes, that at the settlement of the instructions the particular grounds of objection or exception to those deemed erroneous shall be stated, else a motion for a new trial shall not be granted nor a cause reversed by the supreme court for errors in them, applies only to instructions given and not to those refused.—*Billings Realty Co. v. Big Ditch Co.*, 251.

When Refusal not Error.

8. It is not error to refuse a correct instruction where other appropriate instructions upon the same subject have been given.—*Billings Realty Co. v. Big Ditch Co.*, 251.

Errors—Review.

9. Under section 6746, Revised Codes, such errors in instructions as were not called to the attention of the district court at the settlement

of the instructions will not be considered on appeal.—*Allen v. Bear Creek Coal Co.*, 269.

Statement of Pleadings in.

10. Where the district court undertakes in an instruction to set forth the material allegations of the pleadings and the general issues for trial, its charge should present them fully and fairly; the omission of a material admission is error.—*Lynes v. Northern Pac. Ry. Co.*, 317.

Law of Case.

11. The instructions are the law of the case and binding upon the jury; a verdict contrary thereto is a verdict contrary to law, which justifies a new trial, under section 6794, Revised Codes.—*Lynes v. Northern Pac. Ry. Co.*, 317.

Sanity—Presumptions.

12. The presumption that all persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity attaches not only in a criminal case in which the defense of insanity is interposed (Rev. Codes, sec. 8113), but generally to human conduct in the relations of life; hence the giving of an instruction to that effect in a will contest in which the sanity of the testator was called in question was not error. *In re Murphy's Estate*, 353.

Inapplicability.

13. It is error in an instruction to authorize a verdict in favor of plaintiff upon an issue eliminated by reason of an amendment to the complaint.—*McCrimmon v. Murray*, 457.

Declarations of Party—Cautionary Instruction—When Refusal Error.

14. *Held*, that though the propriety of giving an instruction in the words of paragraph 4, section 8028, Revised Codes, that "the oral admissions of a party are to be viewed with caution," is a matter of discretion in the trial court, refusal to give it in this instance was error. *McCrimmon v. Murray*, 457.

When Refusal not Error.

15. Refusal to give instructions is not error where those given substantially cover the law embodied in those requested.—*McCrimmon v. Murray*, 457.

INSURANCE.

See Life Insurance.

INTENT.

Willful,—see Personal Injuries, 1, 2; see, also, Evidence, 9.

INTEREST.

See Judgments, 3.

INTERSTATE COMMERCE.

See Taxation, 1-5.

JUDGMENTS.

Appeal from judgment, dismissal, when,—see Appeal and Error, 17.

"Duly given or made,"—see Pleading and Practice, 17.

Personal judgment in action to foreclose mechanic's lien, when,—see Mechanics' Liens, 5.

See, also, Res JUDICATA, 1.

Appeal—Proceedings After Remand—Entry of Judgment.

1. Under Revised Codes, section 7120, providing that when judgment is rendered on appeal, it must be certified by the clerk of the

supreme court to the clerk of the trial court, who must enter a minute of the judgment on the docket against the original entry, the practice of the clerk of the trial court of signing and recording a formal judgment, on receipt of a *remitititur* by the clerk of the supreme court, is proper, in the absence of any other legislative direction.—*State ex rel. Dolenty v. Reece*, 291.

Same—Mandate of Supreme Court—Effect.

2. A mandate of the supreme court, reversing a judgment and remanding the case, with directions to enter judgment, must be interpreted in the light of the statutes governing the entry of a judgment after appeal, and the requirement to enter judgment as directed must be construed as addressed to the clerk of the trial court.—*State ex rel. Dolenty v. Reece*, 291.

Same—Judgment After Remand—Interest.

3. *Held*, on *mandamus*, under Revised Codes, sections 7172, 7173, relating to costs on appeal after *remitititur* filed with a clerk of the trial court and requiring the clerk to include in the judgment any interest on the verdict or decision from the time it was rendered, that the clerk, in the absence of specific directions as to interest, must include in the judgment directed by the supreme court interest from the date of the order of the supreme court to the time of entry of judgment; but no other interest may be included.—*State ex rel. Dolenty v. Reece*, 291.

Default Judgment—Vacation—Discretion.

4. In determining whether in exercising a sound legal discretion a default judgment should be set aside, the allegations of the complaint and a proposed answer were properly considered.—*Storer v. Graham*, 344.

Same—Refusal to Vacate—Discretion.

5. It was not an abuse of discretion to refuse to set aside a default judgment obtained through inexcusable neglect of defendant, no question of inadvertence or surprise being presented.—*Storer v. Graham*, 344.

JUDICIAL NOTICE.

Electric Arc-light—Power.

1. The court will take judicial notice of the fact that a city arc-light will cast its rays further than 300 feet.—*Meehan v. Great Northern Ry. Co.*, 72.

JUDICIAL OFFICERS.

Nonpartisan nominations, statute *held unconstitutional*,—see Constitution, 6, 7.

Police judge, impeachment,—see Constitution, 1, 2.

JURIES.

Misconduct,—see New Trial, 9.

Evidence—Weight—Credibility of Witness—Disregarding Testimony.

1. Juries may not arbitrarily disregard testimony of unimpeached witnesses supported by all the circumstances in the case.—*Haddox v. Northern Pac. Ry. Co.*, 8.

Permitting Jury to Inspect Building—Discretion of Trial Court.

2. The matter of allowing the jury, in an action on a building contract, to inspect the building many months after its alleged completion, was within the sound legal discretion of the trial court, which will not be reviewed unless an abuse is shown.—*Piper v. Murray*, 230.

JURISDICTION.

Of supreme court,—see Supreme Court.

LACHES.

Contracts—Rescission.

1. Plaintiff's right to rescind on the ground of fraud held to have been barred by laches.—*Ott v. Pace*, 82.

LANDLORD AND TENANT.

What will not create relationship,—see Contracts, 33.

LAW OF CASE.

See Instructions, 11.

LEASES.

When lease and bond one agreement,—see Contracts, 9.

LEGISLATURE.

See Statutes and Statutory Construction.

LEVY.

Of execution, when unnecessary,—see Execution, 2.

LIFE INSURANCE.

Taxation—Interstate Commerce.

1. Revised Codes, section 4073, providing that every insurance company transacting business in the state must be taxed upon the excess of premiums over losses and ordinary expenses within the state during the previous year, applies only to business transacted within the state, and is not objectionable as an interference with interstate commerce.—*New York Life Insurance Co. v. Deer Lodge County*, 243.

Not Commerce.

2. The business of life insurance conducted in the state by a foreign corporation under a certificate of authority from the state, collecting premiums and paying losses on policies and making loans to policy-holders on the security of their policies, is not "commerce" within section 8, Article I, United States Constitution.—*New York Life Insurance Co. v. Deer Lodge County*, 243.

LINCOLN COUNTY.

See Counties, 1-5.

LOGS AND LOGGING.

See Contracts, 28.

MANDAMUS.

To compel clerk of district court to include interest in judgment,—see Judgments, 3.

What not defense,—see Corporations, 3.

See, also, Change of Venue, 3.

MANSLAUGHTER.

See Criminal Law, 6, 16.

MASTER AND SERVANT.

Actions for wages,—see Contracts, 8.

See Personal Injuries, 3-14, 26-52.

MECHANICS' LIENS.

Proceedings to Perfect—Form and Requisites—Statutes.

1. Revised Codes, section 7291, requires that a notice of mechanic's lien shall state under oath that it contains a just and true account of the amount due after the allowance of all credits. Plaintiff's notice of lien set forth with considerable detail the contract between himself and the contractor, the amount of work done, including extra work, the amount of materials furnished, stated the balance claimed to be due, and also stated "that these items are correct," and was signed by plaintiff, and bore a *jurat* reciting that it was subscribed and sworn to before a notary public. *Held*, a sufficient notice.—Mills v. Olsen, 129.

Matters to be Proved.

2. Where it is admitted by the defendants in a proceeding for the enforcement of a mechanic's lien that plaintiff will testify that the items set out in the claim are correct, there is a *prima facie* case for the plaintiff for the full amount of his claim.—Mills v. Olsen, 129.

Amount of Lien—Application of Credits.

3. Where a subcontractor employed on defendants' building has had an account with the contractor for work and material on contracts for other buildings, he has no right to credit the contractor on their old account for material which actually went into the defendants' building, since the defendants are entitled to have these amounts credited to their building.—Mills v. Olsen, 129.

Attorneys' Fees—Unconstitutionality of Statute.

4. Revised Codes, section 7186, allowing an attorney's fee to claimants of mechanics' liens, is unconstitutional.—Mills v. Olsen, 129.

Relief—Personal Judgment, When.

5. Though plaintiff in an action to foreclose a mechanic's lien fails to establish the lien, he may, if his complaint states a cause of action for money due, have a personal judgment in the same action against the person liable for the material furnished or work or labor done.—Wertz v. Lamb, 477.

Variance—Admissions—Estoppel.

6. Where two defendants in an action to foreclose a mechanic's lien alleged affirmatively in their counterclaim that they had employed plaintiff to do the work described in his complaint, thus admitting that the contract was made by both, they were bound by the position assumed in their pleading and therefore estopped to claim that there was a fatal variance between the allegation of the complaint that the contract was made with both defendants, and his proof which showed an agreement with one of them only.—Wertz v. Lamb, 477.

Notice—Sufficiency.

7. Under the rule that it is sufficient if the statute giving the right to a mechanic's lien be complied with substantially by the lien claimant, a notice of lien which stated that a certain sum was due the lienor "after allowing *just* credits and offsets," instead of using the words of the statute (Rev. Codes, sec. 7291), i. e., "after allowing *all* credits," held sufficient.—Wertz v. Lamb, 477.

Form—Statute—Substantial Compliance Sufficient.

8. A mechanic's lien was not void merely because the paper was in form an affidavit, with an itemized statement attached, instead of consisting of a statement of the account and a description of the property, followed by an affidavit. The method pursued was in substantial compliance with the requirements of section 7291, Revised Codes, and therefore sufficient.—*Wertz v. Lamb*, 477.

Introduction of Lien in Evidence—When Unnecessary.

9. A party is required to prove only matters in issue; hence where defendants admitted that plaintiff had perfected and filed "the alleged lien mentioned in plaintiff's complaint," the paper was before the court, and it was therefore not necessary to formally introduce it in evidence.—*Wertz v. Lamb*, 477.

Complaint—Reference to Copy of Lien Attached to—Sufficiency.

10. Where a mechanic's lien is itself sufficient, a reference to a copy of it as attached to, and made a part of the complaint, meets the requirement that plaintiff in an action to foreclose such a lien must allege that he has complied with the provisions of section 7291, Revised Codes.—*Wertz v. Lamb*, 477.

Same—Sufficiency.

11. The allegation in plaintiff's complaint that he completed his work on August 7, 1909, and filed his lien on August 14th of the same year, was itself sufficient to show that the lien was filed within ninety days after the work was done.—*Wertz v. Lamb*, 477.

Foreclosure—Nature of Proceeding—Supreme Court—Final Judgment—When Improper.

12. The procedure for the foreclosure of a mechanic's lien being neither strictly at law nor in equity, but a blending of both, the supreme court on appeal in such a cause may not enter a judgment finally disposing of it, under *State ex rel. La France Copper Co. v. District Court*, 40 Mont. 206, 105 Pac. 721, or section 6253, Revised Codes, where certain issues of fact raised by the pleadings were never fully tried in the district court.—*Wertz v. Lamb*, 477.

MILEAGE.

See Costs, 1.

MINES AND MINING.

Option on,—see Contracts, 10–13.

See, also, Personal Injuries, 14, 26–38.

Placer Claims—"Known Veins" Within—Public Lands.

1. If at the time application for patent to a placer location was made a vein or lode was known to exist within its boundaries but was not claimed or referred to in the patent, such vein or lode remained public property of the United States, mining operations upon which could not be enjoined by the successor in interest of the original placer patentee.—*Washoe Copper Co. v. Junila*, 178.

Same—Character of Vein—Evidence.

2. Evidence touching the character and extent of a quartz lode within the boundaries of a patented placer location, as disclosed by development made after application for patent, which lode was claimed by defendants to have been excluded from such patent because of the fact that it was well known at that time but not claimed by the patentee, was properly admitted.—*Washoe Copper Co. v. Junila*, 178.

Declaratory Statement—Verification—Evidence.

3. A declaratory statement of a quartz lode location, not verified as required by the law in force at the time it was made, was void; hence the reception of a certified copy thereof in evidence was error.—*Washoe Copper Co. v. Junila*, 178.

Placer Patent—Conclusiveness.

4. Evidence that placer mining operations have never been carried on upon the premises included in a placer patent is inadmissible to overcome the effect of the patent; the fact that the ground was and is placer is conclusively established by its issuance.—*Washoe Copper Co. v. Junila*, 178.

Same—Known Vein Excluded—Constructive Knowledge.

5. To exclude a lode from a placer patent, because of the failure of the patentee to lay claim thereto at the time of his application for patent, its existence must have then been known, either to him personally or to the community generally, constructive knowledge on his part sufficing.—*Washoe Copper Co. v. Junila*, 178.

Known Vein—Declarations—Inadmissibility.

6. In an action for damages for ores extracted from a vein within the boundaries of plaintiff's patented placer claim, defendants introduced the deposition of the original owner of the ground, for the purpose of proving by statements contained therein that at the time application for placer patent was made, there was a known quartz vein within the boundaries of the claim. *Held*, that, in the absence of proof that the declarant was the owner of the property at the time the declaration was made, or that he was the grantor of plaintiff, the deposition was hearsay and inadmissible against plaintiff.—*Washoe Copper Co. v. Junila*, 178.

Same—Inadmissibility.

7. Under the rule that the declarations of a person while the owner of land may not be introduced in evidence to either sustain or destroy the record title, the deposition referred to in paragraph 6 above was further inadmissible because its direct effect was to destroy title to that portion of the placer crossed by the vein and a strip of land twenty-five feet wide on either side thereof.—*Washoe Copper Co. v. Junila*, 178.

Option Contracts—Strict Construction.

8. Option contracts relating to mining claims, a character of property which is subject to violent fluctuations in value, are strictly construed, and time is deemed to be of the essence thereof.—*Snider v. Yarbrough*, 203.

Same—Lease and Bond—Rights of Lessor.

9. Plaintiff and defendant entered into a written contract by the terms of which the latter leased to the former a quartz lode claim with an option to purchase, payment of installments to be made at given dates, the agreement to convey to be void if the lessee should fail to pay the full purchase price on or before a certain day, "time being of the essence of this agreement." Plaintiff made the initial payment, and, failing to pay the second installment on time, secured an extension, but again defaulted. *Held*, that defendant, electing to treat the agreement at an end, had a right to re-enter, take possession and relet the property to others—*Snider v. Yarbrough*, 203.

MISTAKE.

See Election of Remedies.

MORTGAGE.

Contract of sale of realty, held not a mortgage,—see Contracts, 32.

MOTIONS.

Joint, effect,—see Non-suit.

MOTIVES.

Improper, in bringing charges of official wrongdoing, no defense,—see Cities and Towns, 15; see also, Criminal Law, 2.

MUNICIPAL CORPORATIONS.

See Cities and Towns.

MURDER.

See Criminal Law, 1-17, 34-38.

NEGATIVE PREGNANT.

See Pleading and Practice, 4.

NEGLIGENCE.

See Logs and Logging; Personal Injuries.

Willful,—see Personal Injuries, 1, 2, 12.

NEGOTIABLE INSTRUMENTS.

See, also, Indorsements.

Acceptance—Jury Questions.

1. Whether the payee of a note refused to accept the same when offered to him, held, under the evidence, for the jury.—O'Meara v. McDermott, 189.

NEW TRIAL.

Misconduct of county attorney,—see Criminal Law, 36.

Affirmance of Order, When.

1. Where the district court in granting a new trial does so in an order general in terms, its action will be affirmed if it can be justified upon any one or more of the grounds assigned in the motion.—Monson v. La France Copper Co., 65.

Same.

2. The supreme court will not interfere with an order granting a new trial in a personal injury action, one ground of the motion for which was insufficiency of the evidence to support the verdict in favor of plaintiff, where the evidence was in direct conflict as to the cause of the injury. If the court under such conditions was dissatisfied with the verdict it was its duty, in the exercise of its legal discretion, to grant a retrial.—Monson v. La France Copper Co., 65.

Grounds—Insufficiency of Evidence.

3. Where, by the undisputed evidence, plaintiff was entitled to some amount, a general verdict for defendant was not supported by the evidence, and the granting of a new trial was proper.—Britannia Min. Co. v. United States F. & G. Co., 94.

Argument—Misconduct of Counsel—Discretion.

4. The matter of allowing counsel, during the argument of a cause, to use language deemed objectionable by appellant, is one controlled by a wise legal discretion of the court; in the absence of a showing of prejudice, a new trial on the ground of misconduct of counsel in that respect will not be granted.—O'Meara v. McDermott, 189.

Appeal and Error—Review—Verdict—Conflicting Evidence.

5. A verdict on conflicting evidence will not be interfered with on appeal as contrary to the weight of the evidence, after the trial court has overruled a motion for a new trial.—Flavin v. Chicago, B. & Q. R. R. Co., 220.

Surprise—What Does not Constitute.

6. That defendant in an adverse suit, relying upon the idea that plaintiff would attack his quartz location upon a certain ground, had prepared his case to meet that ground, but on the trial was confronted with a different theory, was not a valid ground for a motion for new trial because of accident and surprise. A party litigant must be prepared to meet all issues raised by the pleadings.—Orton v. Bender, 263.

Newly Discovered Evidence—Discretion.

7. The granting or refusing of a new trial on the ground of newly discovered evidence rests largely in the discretion of the trial court; in the absence of abuse of such discretion, its ruling will not be disturbed on appeal.—Orton v. Bender, 263.

Disregard of Instructions—Law of Case.

8. The instructions are the law of the case and binding upon the jury; a verdict contrary thereto is a verdict contrary to law, which justifies a new trial, under section 6794, Revised Codes.—Lynes v. Northern Pac. Ry. Co., 317.

Criminal Law—Misconduct of Jurors.

9. That jurors, during their deliberations, examined a court calendar in the jury-room and discovered that there were two criminal cases against accused for the same offense, and that the argument was advanced by jurors that accused must be guilty because of the two cases, may not be shown by affidavits of jurors, within Revised Codes, section 9350, subdivision 4, authorizing a new trial when the verdict has been decided by lot, or by any means other than a fair expression of opinion of all the jurors; but the misconduct is within subdivision 2, authorizing a new trial when the jury received out of court any evidence, other than that resulting from a view of the premises, and cannot be shown by the jurors themselves.—State v. Wakely, 427.

Same—Newly Discovered Evidence—Diligence.

10. An application for a new trial on the ground of newly discovered evidence was properly denied, in the absence of any showing that the presence of the witness was not procurable at the trial at the time a state's witness first mentioned his name, or that any effort had been made to secure the testimony of such witness.—State v. Wakely, 427.

When Order Affirmed.

11. An order, general in terms, granting a motion for a new trial, asked for on the ground, among others, that the evidence was insufficient to justify the verdict will not be disturbed on appeal, where there was a sharp conflict in the evidence on all material issues involved.—Kelly v. City of Butte, 451.

Same.

12. The rule, *supra*, that on appeal an order, general in terms, granting a motion for a new trial will not be disturbed, applies as well to an order denying such a motion.—Kelly v. City of Butte, 451.

Cause Twice Tried not Reason for Refusing New Trial, When.

13. The argument that because an action had been twice tried and the same result reached, a new trial should not be ordered, has no weight where notwithstanding the complaint had been so amended after the first trial as to eliminate a material allegation, the court in its instructions so treated the case as to authorize a verdict in favor of plaintiff upon a question no longer relied on for recovery by reason of the amendment.—*McCrimmon v. Murray*, 457.

NONSUIT.**Joint Motions—Effect.**

1. A party defendant who joins with his codefendants in a motion for nonsuit on a ground which the latter were estopped to assert must abide by the consequences of a reversal of the judgment because of error in granting the motion as to them.—*Wertz v. Lamb*, 477.

NOTICE.

Of action against city,—see Cities and Towns, 11, 12, 16–18, 20.

Of mechanic's lien,—see Mechanics' Liens, 7.

Constructive—Void Instrument Ineffectual.

1. A void instrument cannot impart constructive knowledge to anyone.—*Washoe Copper Co. v. Junila*, 178.

OFFER OF PROOF.**Purpose of—When Unnecessary to State.**

1. Where competent evidence, offered but rejected, could have but one purpose, the fact that such purpose was not disclosed when the offer was made did not render the court's action justifiable.—*Albertini v. Linden*, 126.

OFFICERS.

Judicial, nonpartisan nomination, statute held unconstitutional,—see Constitution, 6, 7.

Tortious acts, place of trial,—see Change of Venue, 3.

Removal,—see Cities and Towns, 4, 5, 13–15.

Misconduct in Office—What Constitutes.

1. Any act involving moral turpitude or any act which is contrary to justice, honesty, principle or good morals, if performed by virtue of office or by authority of office, is included in a charge of misconduct in office.—*State ex rel. Wynne v. Examining and Trial Board*, 389.

OPTION CONTRACTS.

See Contracts, 9–13.

PARTNERSHIP.**Mining Partnership—Death of Member—Effect.**

1. The death of a mining partner does not dissolve the partnership; the estate of the decedent succeeds to his interest and occupies the same relative position that he would occupy if alive.—*Boehme v. Fitzgerald*, 226.

Actions Between Members—When not Maintainable.

2. In the absence of a settlement of the partnership business, one partner cannot maintain an action at law against his copartner with reference to the partnership affairs.—*Boehme v. Fitzgerald*, 226.

Same—Complaint—Insufficiency.

3. A complaint by the administratrix of the estate of her husband in an action against the remaining member of a partnership of which decedent had also been a member, to recover partnership profits, which failed to allege that a settlement or adjustment of the partnership business had been had, did not state a cause of action.—*Boehme v. Fitzgerald*, 226.

PATENT.

To public lands, conclusiveness,—see *Mines and Mining*, 4.

PERSONAL INJURIES.

Negligence—“Willfully.”

1. The rule prescribed by Revised Codes, section 8099, declaring that the word “willfully,” when applied to the intent with which an act is done or omitted, implies simply a willingness to commit the act or make the omission referred to, and does not require any intent to violate law or to injure another, or to acquire any advantage, applies also in civil cases.—*Haddox v. Northern Pac. Ry. Co.*, 8.

Railroads—Injuries to Person on Track—Willful Act or Omission—Insufficiency of Evidence.

2. Evidence *held* insufficient to show that the death of one struck by an engine while on the track was due to any willful act or omission on the part of defendant railroad's engineer.—*Haddox v. Northern Pac. Ry. Co.*, 8.

Master and Servant—Injuries to Servant—Warning Servant.

3. Where a minor operating a ripsaw knew that it was a dangerous machine, and that if he came in contact with it he would be injured, it was not necessary to give him instructions on such points.—*Kuphal v. Western Mont. Flouring Co.*, 18.

Same—Injuries to Servant—Questions for Jury.

4. Ordinarily, it is the function of the jury to say whether a minor servant comprehended the work in such a sense as to absolve the employer from the obligation to instruct him.—*Kuphal v. Western Mont. Flouring Co.*, 18.

Same—Warning Servant.

5. Notice of danger is not enough, but a servant of immature age must have sufficient instruction to enable him to avoid the danger.—*Kuphal v. Western Mont. Flouring Co.*, 18.

Same.

6. In an action for injuries to a minor operating a ripsaw, the question whether defendant was negligent in not sufficiently warning the servant of the danger, *held*, for the jury.—*Kuphal v. Western Mont. Flouring Co.*, 18.

Same.

7. The reason for warning a servant is either to impart to him knowledge that he does not possess, or to impress upon him the necessity of bearing in mind the danger.—*Kuphal v. Western Mont. Flouring Co.*, 18.

Same—Assumption of Risk.

8. A minor assumes the ordinary risks of any employment which he undertakes in so far as the risks are, or ought to have been, known to and appreciated by him.—*Kuphal v. Western Mont. Flouring Co.*, 18.

Same.

9. Where a master negligently omits to instruct a minor servant, he does not assume those risks as to which instructions are necessary.—*Kuphal v. Western Mont. Flouring Co.*, 18.

Same—Injuries to Servant.

10. In an action for injuries to a minor servant operating a ripsaw, plaintiff *held* not guilty of contributory negligence.—*Kuphal v. Western Mont. Flouring Co.*, 18.

Same—Injuries to Minor—Warning—Correct Instruction.

11. Instruction charging jury relative to warning minor servant of dangers, *held* correct.—*Kuphal v. Western Mont. Flouring Co.*, 18.

Same—Pleading—Willfulness—Surplusage.

12. Where, in an action for injuries to a servant, the complaint charged ordinary negligence, and did not as a matter of fact charge willful conduct, the words "reckless" and "wanton" were properly treated as surplusage, and a demurrer to the complaint, on the ground that it could not be determined therefrom whether the action was for simple negligence or for wanton or willful negligence, was properly overruled.—*Kuphal v. Western Mont. Flouring Co.*, 18.

Same—Assumption of Risk—Question for Court or Jury, When.

13. Where reasonable, fair-minded men might draw different conclusions from the evidence as to whether a servant assumed the risk of his employment, the question is properly one for the jury; if, however, it furnishes ground for but one inference, the question is one of law for the court's determination.—*Monson v. La France Copper Co.*, 65.

Same—Statutes—Violation by Master—Assumption of Risk—When Question not Involved.

14. The defense of assumption of risk is available to the master even though the negligence alleged was in violation of a duty imposed by statute; where, however, at the time of the injury of plaintiff's intestate he was so situated (in a deep mining shaft) as to have no choice of means of egress other than that provided by the master, and in the use of which he was killed (a mining cage from which the doors were missing, contrary to the provisions of section 8536, Revised Codes), he will be presumed to have submitted to its use from necessity, and therefore not to have assumed the attendant risk. The refusal of an instruction on that defense, under such circumstances, was not error.—*Monson v. La France Copper Co.*, 65.

Contributory Negligence—Pleading.

15. In an action for personal injuries, contributory negligence is a matter of defense, and its absence need not be pleaded by plaintiff.—*Meehan v. Great Northern Ry. Co.*, 72.

Contributory Negligence—Defense—Burden of Proof.

16. Though under Revised Codes, section 7962, paragraph 4, the law presumes that a person exercises ordinary care for his own safety, yet where plaintiff's own case presents evidence which, if unexplained, establishes *prima facie* contributory negligence, there must be evidence exculpating him, or he cannot recover.—*Meehan v. Great Northern Ry. Co.*, 72.

Railroad Crossings—Care Required of Travelers.

17. A pedestrian before crossing a railroad track, which is in itself a warning of danger, must look and listen, and, if necessary, stop to learn if there is danger.—*Meehan v. Great Northern Ry. Co.*, 72.

Same—Injuries to Pedestrian on Track—Contributory Negligence.

18. In an action for the death of a pedestrian struck by a train, evidence *held* to show contributory negligence by decedent, precluding recovery.—*Meehan v. Great Northern Ry. Co.*, 72.

Amendment of Pleadings—When Proper.

19. Plaintiff in a personal injury action was properly allowed, after reversal of a judgment in his favor and before a new trial was had,

to substitute a specific act of negligence for the one previously relied upon. In such a case so long as the injury complained of is the same in the amendment as that originally declared upon, the amended pleading is not open to the charge that it introduced a different cause of action.—*Flaherty v. Butte Electric Ry. Co.*, 141.

Respondeat Superior—Complaint.

20. While, in a personal injury action where recovery is sought for a negligent act of a servant under the doctrine of *respondeat superior*, the fact that the relationship of master and servant existed at the time of the injury should be pleaded, the absence of such a direct allegation will not be held sufficient to reverse the judgment, if facts are alleged from which it may fairly be inferred that the relationship did so exist.—*Flaherty v. Butte Electric Ry. Co.*, 141.

Street Railways—Duty of Defendant—Breach—Complaint.

21. The complaint in an action against a street railway company alleging that the car which ran over and injured plaintiff was being operated in a public and much used street in a city, and that the motorman failed to keep a vigilant or proper lookout, whereby he might have seen the plaintiff before he came into a place of danger, sufficiently stated the duty cast upon defendant's motorman to keep a lookout for pedestrians, and its breach.—*Flaherty v. Butte Electric Ry. Co.*, 141.

Complaint—Proximate Cause.

22. The act of negligence resulting in plaintiff's injury was alleged to have been the failure of defendant's motorman to keep a proper lookout. *Held*, that this allegation and the further one that by reason of such negligence plaintiff was injured, sufficiently showed the causal connection between the alleged negligence and the injury. *Flaherty v. Butte Electric Ry. Co.*, 141.

Unavoidable Accident—Question for Jury.

23. The question whether because the motorman's vision was so obscured by a passing wagon or a dust storm, claimed to have prevailed at the time of the accident, as to interfere with his attempt to keep a proper lookout, the injury was unavoidable, was properly submitted to the jury, the evidence presenting a sharp conflict in this respect.—*Flaherty v. Butte Electric Ry. Co.*, 141.

Excessive Verdict.

24. *Held*, that a verdict of \$25,000 for injuries to a minor less than three years old at the time of the accident, which resulted in the amputation of one of his limbs at the hip, was excessive, and a new trial ordered unless plaintiff consent to a scaling thereof to the sum of \$12,500.—*Flaherty v. Butte Electric Ry. Co.*, 141.

Carriers—Damages—Excessiveness.

25. Plaintiff claimed that, on account of being ejected from defendant's passenger station while waiting for a train, he contracted a severe cold, which settled in his stomach, turned into neuralgia and pleurisy, and left him permanently injured; that since his injury he had suffered great pain and had been hindered from carrying on his work. His physician testified that his condition was due to exposure; that he was suffering from chronic pleurisy, and would get worse, rather than better; and that this condition could be caused by getting wet and cold. *Held*, that a verdict allowing plaintiff \$2,500 was not excessive.—*Flavin v. Chicago B. & Q. R. R. Co.*, 220.

Complaint—Causal Connection—Sufficiency of Pleading.

26. Under the rule that whatever is necessarily implied from a statement directly made in a pleading, or is reasonably to be inferred

therefrom, is to be taken as directly averred, the complaint in an action to recover damages for injuries sustained in a coal mine through the fall of rock, which, though failing to state specifically that defendant's omission to properly timber the room in which plaintiff worked was the cause of the fall, did aver insufficient timbering, a dangerous condition resulting therefrom, the fall of the rock upon plaintiff, and that defendant "by causing said rock to fall upon plaintiff" crushed and injured him, etc., was sufficient in this regard; the cause of the fall, i. e., defendant's negligence in failing to properly timber the place, was a necessary inference from the averments made.—Allen v. Bear Creek Coal Co., 269.

Same—Negligence—Pleading and Proof—Irrelevancy.

27. Proof of an act of negligence on the part of defendant master not pleaded in the complaint was irrelevant.—Allen v. Bear Creek Coal Co., 269.

Same—Duty of Master—Custom—Evidence—Inadmissibility.

28. Though it was error to permit plaintiff's witnesses to testify that it is customary for coal mine operators to see that the places to which their employees are sent to work are first put in safe condition, it was nonjudicial, the presumption being that the jury accepted the law as announced by the court: that it is incumbent upon the master to exercise ordinary care and diligence to provide his servant with a reasonably safe place in which to work,—rather than as stated by the witnesses.—Allen v. Bear Creek Coal Co., 269.

Same—Improper Cross-examination—Mitigation of Damages.

29. The court properly sustained an objection to a question asked a physician on cross-examination, the purpose of which was, not to test the truth of a statement made by him on direct examination relative to the extent and character of plaintiff's injury, but to elicit evidence in mitigation of damages, to-wit, that he had offered to perform without charge the necessary surgical operation to restore plaintiff's hand to usefulness.—Allen v. Bear Creek Coal Co., 269.

Same—Questions for Jury.

30. The evidence upon the questions whether defendant was reasonably diligent in making the place in which he worked reasonably safe, whether he had been directed to work therein, and whether he was guilty of contributory negligence or assumed the risk, having been in substantial conflict, they were for the jury to determine.—Allen v. Bear Creek Coal Co., 269.

Same—Safe Place to Work—Changing Conditions—Duty of Servant.

31. Plaintiff, if directed to work in a certain room in defendant's coal mine, had a right to assume that his employer had exercised reasonable diligence to inspect and make it safe, and, though he (plaintiff) was required to observe and guard himself against such dangers as were open and obvious to his senses, he was not under any obligations to make tests by sounding the roof to ascertain whether it was loose or likely to fall.—Allen v. Bear Creek Coal Co., 269.

Same—Assumption of Risk.

32. Where a place is completed, the obligation to take precautions to see that it is reasonably safe for his employee rests upon the master; where, however, changes are made in it by the former as the work progresses, the duty to make it safe rests upon him (the employee), the dangers arising from constantly changing conditions in such a place being assumed as incidental to his employment.—Allen v. Bear Creek Coal Co., 269.

Same—Independent Contractor or Servant—How Determined.

33. *Held*, that plaintiff, who worked under the same rules as other coal miners employed by defendant company and was required to obey the directions of its officers as to the details of his work and the means by which it was accomplished, was a servant and not an independent contractor, though he was paid a stipulated sum per ton mined by him.—*Allen v. Bear Creek Coal Co.*, 269.

Same—Instructions—To be Considered Together.

34. The instructions to the jury must be considered together; hence the contention that the defendant suffered prejudice because in one paragraph of its charge the court told the jury that if defendant or its officers were negligent, the plaintiff, "having exercised due care upon his part," should recover, was without merit, where in subsequent instructions the defenses of contributory negligence and assumption of risk were fully covered.—*Allen v. Bear Creek Coal Co.*, 269.

Same—Negligence—Liability of Agents.

35. Defendant company's superintendent and mine foreman could be held liable only for their individual wrongful acts or omissions within the scope of their employment; therefore, an instruction which permitted a recovery of damages against both, without regard to whether the one or the other, or both, were guilty of the negligence alleged by plaintiff, was erroneous.—*Allen v. Bear Creek Coal Co.*, 269.

Same—Instructions—Assumption of Fact—Error.

36. Plaintiff alleged in his complaint that he was in a room in defendant's coal mine pursuant to its command at the time he was injured. Defendant averred that he was there not only without direction but in violation of one of its rules. The court instructed the jury that it was the duty of defendant to make the place reasonably safe "for its servants to be, who were ordered" to work in that place, and that "then its servants who were so ordered to go into" it had a right to assume that defendant had done its duty, etc. *Held*, that the instruction was prejudicially erroneous in that it assumed as proven one of the principal issues in the case, i. e., whether plaintiff was in the place in the course of his employment or not.—*Allen v. Bear Creek Coal Co.*, 269.

Same—Instructions—Law of Case—Disregard by Jury—Effect.

37. The instructions are the law of the case and binding upon the jury; hence where the plaintiff himself had testified that he had not tested the roof of the room in the coal mine in which he was injured, and the court charged the jury (though erroneously) that he could not recover if he had not done so upon entering the place and was thereafter hurt through a fall of rock, a verdict in his favor was in disregard of the instruction, necessitating a new trial.—*Allen v. Bear Creek Coal Co.*, 269.

Same—Excessive Verdict—Passion and Prejudice.

38. Plaintiff, a coal miner, was fifty-nine years of age at the time of the accident which resulted in the loss of the third finger of his right hand and the laceration of the palm in such a way as to stiffen the second finger. His earnings, with the assistance of two minor sons, had not exceeded \$144 per month for some time. The jury, in arriving at a verdict of \$10,000, not only disregarded uncontradicted evidence to the effect that the disabled condition of his hand was partly due to his refusal to have it treated, but also an instruction which in substance was a direction to find in favor of defendant. *Held*, that the verdict was so excessive as to show passion and pre-

judice rather than inadvertence on the part of the jury in making their estimate.—*Allen v. Bear Creek Coal Co.*, 269.

Master and Servant—Railroads—Contributory Negligence—Complaint—Insufficiency.

39. Under the rule that where plaintiff's own act is a proximate cause of a personal injury for which he seeks to recover damages, he must allege (and prove) that he acted as a reasonably prudent person would have done under like circumstances, *held*, that the complaint of a locomotive engineer which alleged that, fearing a collision, he jumped from his engine and was injured, but failed to disclose the necessary facts to negative the presumption of negligence on his part in acting as he did, did not state a cause of action.—*Lynes v. Northern Pac. Ry. Co.*, 317.

Same—Contributory Negligence.

40. A locomotive engineer who was injured in a collision while on a certain track with his train in violation of a rule of defendant company was *prima facie* guilty of a contributory negligence, precluding recovery in the absence of a showing in excuse of his apparent wrongdoing.—*Lynes v. Northern Pac. Ry. Co.*, 317.

Evidence—Tables of Experiments—Admissibility in Evidence.

41. *Held*, that tables showing the effect of experiments made by the manufacturer of the air-brakes with which plaintiff locomotive engineer's train was equipped, offered in evidence for the purpose of showing their available power to control the movements of trains of different tonnage under varying conditions, were admissible upon the same principle as are mortality tables, almanacs, market reports, etc. —*Lynes v. Northern Pac. Ry. Co.*, 317.

Master and Servant—Rules—Interpretation—When for Court.

42. Where the language of defendant company's rules relative to the operation of its trains under the block signal system was plain and its meaning apparent, it was the duty of the trial court to determine the meaning to be given them and not a matter to be submitted to the jury.—*Lynes v. Northern Pac. Ry. Co.*, 317.

Same—Negligence—Proximate Cause—What Constitutes.

43. To enable plaintiff in a personal injury action to recover damages, he must show that the negligence charged was a proximate cause of the injury, i. e., a cause which in a natural and continuous sequence, unbroken by any new, independent cause, produced the injury, and without which it would not have occurred.—*Therriault v. England*, 376.

Same—Proximate Cause—What Does not Constitute.

44. A cause which, in intervening between defendant's negligence and plaintiff's injury, will break the chain of sequence of the former's wrongful act and relieve him from liability therefor, is one which could not have been foreseen or anticipated by him as a probable consequence of his negligence.—*Therriault v. England*, 376.

Same—Negligence—Proximate Cause—Evidence.

45. Plaintiff, a minor, was employed by defendant members of a gun club to load the automatic traps used to propel clay pigeons. His place of employment was in a newly constructed traphouse, the back of which, composed of rough boards closely fitted together, faced the shooters. Between the date of its construction and the accident a crack about one-eighth of an inch wide appeared between two boards forming the back, of the existence of which defendants, however, knew nothing. Plaintiff relinquished his post of duty at the traps to a boy friend and proceeded to look at the shooters through the crack; while doing so, scattering shot struck him in the

face, causing the injuries complained of. *Held*, that defendants' negligence was not the, or a, proximate cause of plaintiff's injury, but that plaintiff's own act intervened to make possible the resulting injury.—*Therriault v. England*, 376.

Same—Contributory Negligence.

46. Plaintiff not having been engaged in the discharge of his duties at the time of his injuries, but having voluntarily placed himself in a known situation of danger to satisfy his curiosity, was not in any position to recover compensation from his employers.—*Therriault v. England*, 376.

Same—Minors—Contributory Negligence—Infancy.

47. Plaintiff having negligently exposed himself to a danger which he fully understood and appreciated, the fact that he was a minor and "did not think about" the danger at the time the accident happened, did not excuse him from the consequences of his negligent act.—*Therriault v. England*, 376.

Same—Duty of Master to Warn.

48. Where a minor servant has knowledge of all the facts concerning his employment and appreciates the dangers surrounding it, forming a correct judgment upon them, his master is not under any obligation to warn him with respect to them.—*Therriault v. England*, 376.

Same—Coal Mines—Assumption of Risk.

49. A servant assumes all the usual and ordinary risks attendant upon his employment, not including risks arising from negligence of the master, and he assumes the latter as well if he knows of the defects from which they arise and appreciates the dangers which flow from such defects.—*Fotheringill v. Washoe Copper Co.*, 485.

Same—Assumption of Risk—Knowledge by Servant.

50. Where an experienced miner agreed to take the coal from a mine, defendant to do the timbering, and, by the method of timbering adopted, the timbers were brought up within about four feet of the coal, and because of the nature of the roof between the timbers and the coal the danger from falling rock was serious, and plaintiff knew this and commented on it, and knew the means and feasibility of another method of timbering by "forepoling" the space between the other timbers and the coal, and urged defendant to do this, but continued to work, without promise on defendant's part that different methods would be adopted, there was an assumption of risk.—*Fotheringill v. Washoe Copper Co.*, 485.

Same—Assumption of Risk—Nature of Defense.

51. The defense of assumption of risk is not founded in contract, and may be interposed against a servant, not because he agreed, but because it is a part of the law which can only be abrogated by the legislature.—*Fotheringill v. Washoe Copper Co.*, 485.

Same—Evidence—Sufficiency.

52. Evidence *held* to show that the master did not hold out assurance that a different method of timbering a mine would be adopted, relieving the servant of assumption of risk.—*Fotheringill v. Washoe Copper Co.*, 485.

PERSONAL PROPERTY.

When deemed real property,—see Execution, 1, 2.

PLACE OF TRIAL.

See Change of Venue.

PLEADING AND PRACTICE.

Criminal,—see Criminal Law.

Negligence—Willful Conduct—Surplusage.

1. Where, in an action for injuries to a servant, the complaint charged ordinary negligence, and did not as a matter of fact charge willful conduct, the words "reckless" and "wanton" were properly treated as surplusage, and a demurrer to the complaint, on the ground that it could not be determined therefrom whether the action was for simple negligence or for wanton or willful negligence, was properly overruled.—*Kuphal v. Northern Pac. Ry. Co.*, 18.

Personal Injuries—Contributory Negligence—Pleading.

2. In an action for personal injuries, contributory negligence is a matter of defense, and its absence need not be pleaded by plaintiff.—*Meehan v. Great Northern Ry. Co.*, 72.

Contracts—Rescission—Fraud—Complaint—Insufficiency.

3. The complaint in an action to rescind a contract on the ground of fraud, from which the date when plaintiff discovered the facts upon which he relied for rescission could not be ascertained, was vulnerable to a special demurrer because ambiguous, unintelligible and uncertain.—*Ott v. Pace*, 82.

Denial—Negative Pregnant.

4. The allegation in an answer denying that defendant has any knowledge or information sufficient to form a belief that plaintiff company "is now or at any of the times in said complaint mentioned was duly, or at all, organized or existing under or by virtue of the laws of the state of Wisconsin," etc., was a negative pregnant, and did not raise any issue as to the corporate existence of plaintiff.—*Britannia Min. Co. v. United States F. & G. Co.*, 94.

Amendments—Bill of Exceptions—Record—Review.

5. An amended pleading supersedes the original one, is therefore no part of the judgment-roll, and can be made a part of the record on appeal only by bill of exceptions, properly settled; hence the action of the court in sustaining a motion to strike certain portions of the answer as originally drawn was not subject to review where the displaced pleading was not so identified.—*Bordeaux v. Bordeaux*, 102.

Demurrer—What Admitted by.

6. The rule that by interposing a demurrer to an answer the pleader admits the truth of its allegations includes only facts properly pleaded, and does not extend to mere conclusions of law or inferences from facts not pleaded or conclusions drawn therefrom even if alleged in the pleading.—*State ex rel. Deeney v. Butte Electric & P. Co.*, 118.

Pleadings—Amendments.

7. Where amendments of pleadings do not change the nature of the action or mislead the adversary to his prejudice, their allowance is the rule, their denial the exception.—*Flaherty v. Butte Electric Ry. Co.*, 141.

Same.

8. Plaintiff in a personal injury action was properly allowed, after reversal of a judgment in his favor and before a new trial was had, to substitute a specific act of negligence for the one previously relied upon. In such a case so long as the injury complained of is the same in the amendment as that originally declared upon, the amended pleading is not open to the charge that it introduced a different cause of action.—*Flaherty v. Butte Electric Ry. Co.*, 141.

Personal Injuries—*Respondeat Superior*—Complaint.

9. While, in a personal injury action where recovery is sought for a negligent act of a servant under the doctrine of *respondeat superior*,

the fact that the relationship of master and servant existed at the time of the injury should be pleaded, the absence of such a direct allegation will not be held sufficient to reverse the judgment, if facts are alleged from which it may fairly be inferred that the relationship did so exist.—*Flaherty v. Butte Electric Ry. Co.*, 141.

Same—Street Railways—Duty of Defendant—Breach—Complaint.

10. The complaint in an action against a street railway company alleging that the car which ran over and injured plaintiff was being operated in a public and much used street in a city, and that the motorman failed to keep a vigilant or proper lookout, whereby he might have seen the plaintiff before he came into a place of danger, sufficiently stated the duty cast upon defendant's motorman to keep a lookout for pedestrians, and its breach.—*Flaherty v. Butte Electric Ry. Co.*, 141.

Same—Complaint—Proximate Cause.

11. The act of negligence resulting in plaintiff's injury was alleged to have been the failure of defendant's motorman to keep a proper lookout. *Held*, that this allegation and the further one that by reason of such negligence plaintiff was injured, sufficiently showed the causal connection between the alleged negligence and the injury.—*Flaherty v. Butte Electric Ry. Co.*, 141.

Partners—Actions Between—Complaint—Insufficiency.

12. A complaint by the administratrix of the estate of her husband in an action against the remaining member of a partnership of which decedent had also been a member, to recover partnership profits, which failed to allege that a settlement or adjustment of the partnership business had been had, did not state a cause of action.—*Boehme v. Fitzgerald*, 226.

Complaint—Indefiniteness—Waiver.

13. An objection to a complaint on the ground of indefiniteness is waived unless a special demurser on that account is interposed.—*Billings Realty Co. v. Big Ditch Co.*, 251; *Allen v. Bear Creek Coal Co.*, 269.

Irrigation Canals—Injuries to Land—Description of Premises—Complaint—Sufficiency.

14. As against a general demurrer or objection to the introduction of evidence, a complaint seeking damages occasioned by the overflow of water from an irrigating canal, which described the land upon which the trespass was alleged to have been committed, as the north half of the northwest quarter of a certain section in a designated township, "with the exception of twenty-nine acres" theretofore sold, was sufficiently specific to identify the premises.—*Billings Realty Co. v. Big Ditch Co.*, 251.

Personal Injuries—Complaint—Causal Connection—Sufficiency of Pleading.

15. Under the rule that whatever is necessarily implied from a statement directly made in a pleading, or is reasonably to be inferred therefrom, is to be taken as directly averred, the complaint in an action to recover damages for injuries sustained in a coal mine through the fall of rock, which, though failing to state specifically that defendant's omission to properly timber the room in which plaintiff worked was the cause of the fall, did aver insufficient timbering, a dangerous condition resulting therefrom, the fall of the rock upon plaintiff, and that defendant "by causing said rock to fall upon plaintiff" crushed and injured him, etc., was sufficient in this regard; the cause of the fall, i. e., defendant's negligence in failing to properly timber the place, was a necessary inference from the averments made.—*Allen v. Bear Creek Coal Co.*, 269.

Same—Master and Servant—Railroads—Contributory Negligence—Complaint—Insufficiency.

16. Under the rule that where plaintiff's own act is a proximate cause of a personal injury for which he seeks to recover damages, he must allege (and prove) that he acted as a reasonably prudent person would have done under like circumstances, *held*, that the complaint of a locomotive engineer which alleged that, fearing a collision, he jumped from his engine and was injured, but failed to disclose the necessary facts to negative the presumption of negligence on his part in acting as he did, did not state a cause of action.—*Lynes v. Northern Pac. Ry. Co.*, 317.

Error in Pleading—Cure by Pleading of Adverse Party.

17. Under Revised Codes, section 6571, making it sufficient in a suit on a judgment to plead that it was "duly given or made," an allegation that a judgment was "made, filed, and entered," was cured by averments of a proposed answer that the judgment was duly given and made.—*Storer v. Graham*, 344.

Same—Complaint—Insufficient Allegations Cured by Answer.

18. An insufficient allegation in a complaint that a certain company was "a corporation" was cured by an averment in the proposed answer that the company was "a corporation of Montana."—*Storer v. Graham*, 344.

Corporations—Pleading—Capacity to Sue.

19. An allegation that a defendant was a corporation was sufficient to show its capacity to be sued.—*Storer v. Graham*, 344.

Actions Against Cities—Notice—Complaint—Insufficiency.

20. The complaint in an action against a city for damages to plaintiff's premises occasioned by a defective sewer-pipe, which failed to allege that the notice required by section 3289, Revised Codes, had been given to defendant city, did not state a cause of action.—*Butte Machinery Co. v. City of Butte*, 351.

Mechanics' Liens—Complaint—Reference to Copy of Lien Attached to Sufficiency.

21. Where a mechanic's lien is itself sufficient, a reference to a copy of it as attached to, and made a part of the complaint, meets the requirement that plaintiff in an action to foreclose such a lien must allege that he has complied with the provisions of section 7291, Revised Codes.—*Wertz v. Lamb*, 477.

Same—Complaint—Sufficiency.

22. The allegation in plaintiff's complaint that he completed his work on August 7, 1909, and filed his lien on August 14th of the same year, was itself sufficient to show that the lien was filed within ninety days after the work was done.—*Wertz v. Lamb*, 477.

Pleadings—Amendment—Evidence—Admissibility of Original Pleading.

23. Where, in an action for damages to plaintiff's land, alleged to have been occasioned by the negligence of defendant company in managing a drive of logs, the original answer contained a paragraph admitting the driving thereof, which pleading, however, was subsequently amended by alleging that the logs were driven by another under a contract with defendant, the reception in evidence of the paragraph prior to amendment was harmless, the jury in the course of the trial having been fully informed as to the contract and the circumstances under which the logs were driven.—*Eeraert v. Eureka Lumber Co.*, 517.

Special Damages—Pleading—Evidence—Inadmissibility.

24. Damages to plaintiff's lands, not flooded, claimed as incidental to those caused to property actually injured or destroyed by defendant's

negligence, were special; they not having been pleaded, evidence that such lands had been lessened in value in a certain amount per acre, by reason of the injury to flooded land and the improvements thereon, was erroneously admitted.—*Eeraert v. Eureka Lumber Co.*, 517.

Trial—Objections to Evidence—When Too Late.

25. An objection made to a question after it had been answered was too late to avail appellant.—*State v. Barrett*, 502.

Cities and Towns—Defective Sidewalks—Notice—Complaint.

26. The complaint in an action against a city to recover damages for personal injuries caused by a defective sidewalk, must state facts from which the length of time intervening between the injury and notice of the unsafe condition in the walk may be determined.—*McEnaney v. City of Butte*, 526.

Cancellation of Contract—Tender—Sufficiency.

27. In a suit to cancel a contract of sale of real property because of breaches thereof by the vendee, the complaint which alleged that the notes evidencing deferred payments were brought into court for cancellation and return to defendant, was sufficient as against the objection that tender thereof had not been made before commencement of suit.—*Arnold v. Fraser*, 540.

Same—Encumbrances—Freedom from—Complaint—Sufficiency.

28. An allegation that the land mentioned in a contract of sale was free from encumbrances and that plaintiffs were able to convey title was unnecessary in a suit by the vendor seeking cancellation because of breaches of its provisions by the vendee.—*Arnold v. Fraser*, 540.

Same—Tender—Complaint—Sufficiency.

29. Assuming (but not deciding) that it was necessary for plaintiffs to allege that they had tendered to defendant all moneys paid by him under the contract of sale, the requirement of the law that defendant shall first be placed *in statu quo*, was met by an allegation that he had the use of the premises from the date of the contract to the commencement of suit, and that the rental value of the property exceeded the amounts paid by defendant to or for the use of plaintiffs.—*Arnold v. Fraser*, 540.

POLICE DEPARTMENT.

Reducing force,—see Cities and Towns, 8.

Removal of chief of police,—see Cities and Towns, 13-15.

POLICE JUDGES.

Removal from office,—see Constitution, 1, 2, and Cities and Towns, 4, 5.
See, also, Prohibition.

POLICY OF LAW.

See Actions, 1.

PRESUMPTIONS.

Sanity,—see Wills, 4, 5.

Equity—Evidence—Erroneous Admission.

1. In an equity action, though tried with a jury, it may be presumed that the judge in reaching the final conclusion disregarded incompetent and immaterial evidence, admitted over objection.—*Bordeaux v. Bordeaux*, 102.

Appeal and Error—Review—Rulings at Trial.

2. Where the evidence in a proceeding for the enforcement of a mechan-ic's lien is such that it cannot be ascertained how the court and jury

arrived at the amount awarded to the plaintiff, the supreme court in disposing of the case will give plaintiff the benefit of the presumption that all contested questions of fact were decided in his favor.—*Mills v. Olsen*, 129.

Appeal—Error.

3. Error must be made to appear; it will not be presumed.—*Orton v. Bender*, 263.

PROBATE PROCEEDINGS.

Contest of will,—see Wills.

PROHIBITIONS.

When Writ Does not Lie.

1. Prohibition does not lie at the suit of a police judge of a city to prohibit the city council from proceeding to remove him from office, where written charges have not been filed as required by Revised Codes, section 3236.—*State ex rel. Working v. Mayor*, 61.

Supreme Court—When Writ Does not Lie.

2. Under section 7228, Revised Codes, authorizing the supreme court to issue a writ of prohibition to an inferior tribunal where there is not any plain, speedy and adequate remedy in the ordinary course of law, the writ does not lie to prevent further prosecution of an action in a police court to punish relator for a violation of a city ordinance, alleged by him to be void for various reasons, the remedy by appeal or by writ of *habeas corpus* being thorough and complete.—*State ex rel. Browne v. Booher*, 569.

PROMISSORY NOTES.

See Negotiable Instruments.

PROXIMATE CAUSE.

See Personal Injuries, 22, 43-45.

PUBLIC SERVICE CORPORATIONS.

See Corporations.

RAILROADS.

Rules, interpretation,—see District Court, 1.

See, also, Personal Injuries, 2, 15-25, 39-42.

Carrier and Passenger—Contract of Carriage—Rule of Construction.

1. The rule that one who accepts a contract and avails himself of its provisions is bound by the stipulations and conditions contained in it applies to contracts of carriage, provided the conditions are reasonable and not prohibited by law.—*Sanden v. Northern Pac. Ry. Co.*, 209.

Same—Special Contracts—Contents—Presumptions.

2. One who purchases a railroad ticket at full fare is not required to read the printed matter thereon to ascertain whether there are in it unusual stipulations, and is, therefore, not presumed to have accepted conditions other than those imposed by law; where, however, he buys a ticket at a reduced rate, and the circumstances are such as to notify him of that fact, he is affected with notice of any unusual terms and conditions attached to its use and bound thereby, whether he reads them or not or is incapable of reading them.—*Sanden v. Northern Pac. Ry. Co.*, 209.

Same—Special Contract of Carriage—Breach by Passenger—Ejection—When not Unlawful.

3. Plaintiff bought a second-class limited railroad ticket from St. Paul to Seattle. It provided that it was subject to exchange at any point on the route for a continuous passage ticket or check. A train auditor took up the ticket and delivered in its stead an exchange or identification check which contained a provision that stop-over privileges were allowable on the check, on application to the conductor, if it bore a thirty-day limit. Various conductors informed plaintiff that she could stop over at Butte for a day, as did also defendant's agent at the latter place. The next day, upon resumption of her journey, she was ejected from the train by the conductor, who refused to receive the check and demanded payment of fare. *Held*, that the check did not constitute a substitute contract for that contained in the ticket; that plaintiff was bound by the conditions printed thereon; that neither the conductors nor the agent had authority to waive the stipulation with reference to stop-over privileges, and that her ejection from the train under the circumstances was not unlawful. (Rev. Codes, sec. 5350.) *Sanden v. Northern Pac. Ry. Co.*, 209.

Same—Regulations—Observance by Passenger.

4. The right of the purchaser of a first-class railroad ticket to proceed on his journey to his destination after he has entered a car in a train apparently ready to receive passengers is dependent upon his observance of all reasonable rules adopted by the carrier for the government of travel upon the character of train upon which he assumes to take passage.—*Doherty v. Northern Pac. Ry. Co.*, 294.

Same—Rights of Carrier.

5. When the demands of business require it, a railroad company may run trains composed exclusively of sleeping-cars and exclude or remove therefrom all persons who have not provided themselves with berths or seats, under reasonable regulations, if the company has at the same time made provision to accommodate the public by running other trains at reasonable intervals.—*Doherty v. Northern Pac. Ry. Co.*, 294.

Same—Regulations—Duty of Passenger.

6. The obligation rests upon one proposing to become a passenger upon a railroad train, to inquire, when he purchases his ticket, as to the mode of travel provided and conduct himself accordingly; it is not incumbent upon the carrier to bring home to the passenger notice of its rules and regulations in that respect.—*Doherty v. Northern Pac. Ry. Co.*, 294.

Same—Rules—Reasonableness—Question of Law.

7. Where the facts are not in dispute, the question of the reasonableness of a rule relative to the carriage of passengers sought to be enforced by a railroad company is one of law, exclusively for the court.—*Doherty v. Northern Pac. Ry. Co.*, 294.

Same—Sleeping-cars—Rules—Reasonableness.

8. *Held*, that a rule that seat tickets, or half berths, on Pullman sleeping-cars, should not be sold to passengers boarding the train after a certain hour at night and before 7 o'clock in the morning was not unreasonable and arbitrary.—*Doherty v. Northern Pac. Ry. Co.*, 294.

Same—Ejection of Passenger—When not Unlawful.

9. Plaintiff purchased a first-class railway ticket, and at 6 o'clock A. M. boarded defendant's train, composed entirely of Pullman sleeping-cars. The conductor, relying upon the rule set forth in paragraph 8, *supra*, demanded berth rate fare. Plaintiff, though willing to pay for half a berth, the price of a seat, refused to pay that asked and was put off the train at the next station. He brought suit and relied

for recovery upon the unreasonableness of the rule. *Held*, that the district court properly directed a verdict in favor of defendant.—Doherty v. Northern Pac. Ry. Co., 294.

RAPE.

See Criminal Law, 32, 33.

REAL PROPERTY.

Cancellation of contract of sale,—see Contracts, 29-36.

Declarations of former owner relating to title, admissibility,—see Evidence, 14, 15.

Injury to,—see Logs and Logging.

Injury to, notice of,—see Cities and Towns, 11, 12.

When personal property deemed,—see Execution, 1, 2.

RECORD ON APPEAL.

See Appeal and Error, 4.

REMEDIES.

See Election of Remedies; Prohibition, 2.

REMITTITUR.

Entry of judgment after,—see Judgments, 1-3.

Loss of jurisdiction by supreme court on issuance of,—see Supreme Court, 6.

RESCISSON.

See Contracts, 1-7.

RES GESTAE.

See, also, Evidence, 38.

Dying Declarations—Admissibility in Evidence.

1. Statements of deceased in his dying declaration that the shooting was without provocation, that there was not any trouble between him and defendant, and that the declarant was not armed at the time he was shot, were not objectionable as conclusions, opinions or mere matters of belief, but were admissible in evidence as a part of the *res gestae*.—State v. Crean, 47.

RES JUDICATA.

Judgments—Construction—Estoppel.

1. In an action on a note and for services, a judgment construed, and held to show that the sole question decided was that an alleged agreement of partnership was never entered into between the parties, and that hence plaintiff was not estopped to claim that the note was given for services.—O'Meara v. McDermott, 189.

RULES.

Interpretation for court, when,—see District Courts, 1.

Public service corporations may make reasonable,—see Corporations, 2; Railroads, 4-9.

SEPARATION.

See Divorce.

SEWERS.

See Cities and Towns, 9, 10.

SHERIFF.

See Execution, 1, 2.

SPECIAL DAMAGES.

See Pleading and Practice, 24.

SPECIAL IMPROVEMENTS.

See Cities and Towns, 9, 10.

STATUTE OF LIMITATIONS.

When Action Commenced in Time.

1. On April 5, 1904, plaintiff brought an action for an accounting and other equitable relief, which on March 6, 1905, was dismissed without prejudice on his own application; on the same day he commenced a new action which, on May 20, 1907, resulted in a nonsuit on motion by defendant. On July 16, 1907, the third action was instituted. *Held*, under section 6464, Revised Codes, that the second action, concededly brought in time, having been terminated in a manner other than "by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits," the third one, commenced within one year after such termination, was in time, and a denial of defendant's motion to dismiss the action on the ground that it was barred by the statute of limitations was proper.—*Wilson v. Norris*, 454.

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STATUTES AND STATUTORY CONSTRUCTION.

Mechanics' Liens—Attorneys' Fees—Unconstitutionality.

1. Section 7166, Revised Codes, allowing an attorney's fee to the claimant of a mechanic's lien, *held unconstitutional*.—*Mills v. Olsen*, 129.

Statutes—Validity—How Determined.

2. The validity of a statute is not to be determined by what has been, but by what may be, done under it.—*State ex rel. Holliday v. O'Leary*, 157.

Same—Who may Question Validity.

3. One to whom a statute denies a right which, in its absence, he would have, may raise the question of the constitutionality of the Act.—*State ex rel. Holliday v. O'Leary*, 157.

Elections—Nominations to Judicial Office—Constitution—Invalidity of Statute.

4. *Held*, under the rule that a statute which denies to the electors of the state, or any part of it, the right to nominate candidates for public

office is void as violative of the Bill of Rights (Const., Art. III, secs. 5, 26), that Chapter 113, Laws of 1909, providing for nonpartisan nomination to judicial office, by petition, is invalid because incapable of being made to operate uniformly throughout the state, in that it fails to provide any means by which a candidate for judicial office may be nominated in a newly created municipality, or for a newly created judicial office, or for judicial office in a district the boundaries of which have been changed since the last election or may be changed hereafter. *State ex rel. Holliday v. O'Leary*, 157.

Statutes—Defective Title.

5. Chapter 113, Laws of 1909, held, unconstitutional for the further reason that its title does not clearly express the purpose of the statute, as required by section 23, Article IV of the Constitution.—*State ex rel. Holliday v. O'Leary*, 157.

New Counties—County Seats—Legislature—Implied Powers.

6. The legislature having the power to create new counties by special act (*Holliday v. Sweet Grass County*, 19 Mont. 384, 48 Pac. 553), authority to do all things incidental to a complete exercise of such power is implied.—*State ex rel. Geiger v. Long*, 401.

Same—"Changing" and "Removing" County Seats.

7. The words "changing" and "removing" found in the Constitution and the statute laws having to do with county seats, refer to the act of changing or removing a county seat which has been definitely located and not to a temporary or provisional one.—*State ex rel. Geiger v. Long*, 401.

Lincoln County—Permanent County Seat—Location—Constitutionality of Act.

8. Held, that that portion of the Act creating Lincoln county (Laws of 1909, Chapter 133) providing, after designating the town of Libby as the county seat, that the people of said county should definitely fix the county seat by means of an election, was not unconstitutional as conflicting with the provision of section 26, Article V, of the Constitution, that "the legislative assembly shall not pass local or special laws * * * locating or changing county seats."—*State ex rel. Geiger v. Long*, 401. (Overruled on rehearing, p. 415.)

Interpretation of Statutes—Intent of Legislature—Part of Statute.

9. In the interpretation of a statute the courts must look to the statute itself, its history, or both, for the key to the legislative intent, a thing within the intention of its makers being as much within the statute as if within the letter.—*State ex rel. Geiger v. Long*, 415.

Constitution—Special Laws—Prohibition Absolute.

10. The prohibition against local or special laws, in section 26, Article V, of the Constitution, is absolute.—*State ex rel. Geiger v. Long*, 415.

Same—Special Laws—What not Excuse for Enactment.

11. Failure on the part of the legislature to pass a general law on a given subject does not justify the enactment of a special one which is prohibited.—*State ex rel. Geiger v. Long*, 415.

STIPULATIONS.

Construction,—see Admissions, 1.

STREET RAILWAYS.

See Personal Injuries, 19-25.

SUPERVISORY CONTROL.

Jurisdiction of supreme court to issue writ,—see Supreme Court, 3.

SUPREME COURT.

Original Jurisdiction—Constitution.

1. The supreme court may not take original jurisdiction in any case unless authority to do so is found in the Constitution.—*State ex rel. City of Helena v. Helena Waterworks Co.*, 169.

Appellate Jurisdiction—Constitution.

2. The appellate jurisdiction granted the supreme court in section 2, Article VIII of the Constitution, is properly invoked by appeal only (or perhaps by writ of error), and is confined in its exercise to a review of cases which have been decided by the district courts. *State ex rel. City of Helena v. Helena Waterworks Co.*, 169.

Supervisory Control Over Inferior Courts—Constitution.

3. The supervisory power of the supreme court granted by section 2, Article VIII of the Constitution, was designed to control summarily the course of litigation in the inferior courts and prevent injustice being done through a mistake of law or a willful disregard of it, where there is no appeal from the erroneous action, or where, there being an appeal, the relief obtained thereby would be inadequate.—*State ex rel. City of Helena v. Helena Waterworks Co.*, 169.

Injunction—Power to Issue, When.

4. To authorize the supreme court to issue the writ of injunction in the exercise of its original equity jurisdiction (as distinguished from its power to grant the writ to preserve the subject of the action pending appeal) the rights of the public, i. e., those of the state or some subdivision thereof, must be involved.—*State ex rel. City of Helena v. Helena Waterworks Co.*, 169.

Same—Original Jurisdiction.

5. In seeking to provide a water supply and construct a system for itself and its inhabitants, a city acted in its private corporate capacity, as distinguished from an exercise of its public powers; hence it was in no position to invoke the original jurisdiction of the supreme court, by way of injunction, in a controversy arising in connection with that enterprise.—*State ex rel. City of Helena v. Helena Waterworks Co.*, 169.

Jurisdiction on Appeal—*Remittitur*—Effect.

6. When a *remittitur* is issued by the supreme court on appeal, it loses jurisdiction of the case.—*State ex rel. Dolenty v. Reece*, 291.

Appeal—Final Judgment—When Improper.

7. The procedure for the foreclosure of a mechanic's lien being neither strictly at law nor in equity, but a blending of both, the supreme court on appeal in such a cause may not enter a judgment finally disposing of it, under *State ex rel. La France Copper Co. v. District Court*, 40 Mont. 206, 105 Pac. 721, or section 6253, Revised Codes, where certain issues of fact raised by the pleadings were never fully tried in the district court.—*Wertz v. Lamb*, 477.

Prohibition—When Writ Does not Lie.

8. Under section 7228, Revised Codes, authorizing the supreme court to issue a writ of prohibition to an inferior tribunal, the writ does not lie to prevent further prosecution of an action in a police court brought to punish relator for a violation of a city ordinance, alleged by him to be void for various reasons, the remedy by appeal or writ of *habeas corpus* being thorough and complete.—*State ex rel. Browne v. Booher*, 569.

SURPLUSAGE.

Information charging murder,—see Criminal Law, 7.

Willful negligence,—see Pleading and Practice, 1.

TAXATION.

Assessment for special improvements,—see Cities and Towns, 9, 10.

Insurance Companies—Excess of Premiums Over Losses—Interstate Commerce.

1. Revised Codes, section 4073, providing that every insurance company transacting business in the state must be taxed upon the excess of premiums over losses and ordinary expenses within the state during the previous year, applies only to business transacted within the state, and is not objectionable as an interference with interstate commerce.—*New York Life Insurance Co. v. Deer Lodge County*, 243.

Telegraph—Interstate Commerce.

2. Upon acceptance by the Western Union Telegraph Company of the provisions of the Act of the Congress passed to aid in the construction of telegraph lines and to secure to the government their use for postal, military and other purposes (14 Stats. at Large, 221), that company became an agency of the federal government for the transaction of its postal business, and an instrumentality of interstate and foreign commerce.—*State v. Western Union Telegraph Co.*, 445.

Same—Interstate Commerce—Governmental Business.

3. A state may not tax the right to carry on interstate commerce or an agency employed in conducting the business of the government.—*State v. Western Union Telegraph Co.*, 445.

Same—Franchise Tax—When Void.

4. Where an assessor had assessed in a lump sum the franchise of a telegraph company doing an interstate, intrastate, as well as governmental business, instead of fixing a separate valuation upon the right of the company to do intrastate private business only, the entire assessment on the franchise was void, and the tax, paid under protest, illegal.—*State v. Western Union Telegraph Co.*, 445.

Same—Telegraph—What Part of Franchise Taxable.

5. *Semblé:* That a state may tax the right of a telegraph company doing an interstate and intrastate business, to transact intrastate private, as distinguished from governmental, business, seems to be recognized.—*State v. Western Union Telegraph Co.*, 445.

TELEGRAPH.

See Taxation, 2-5.

TENDER.

Sufficiency in action to cancel contract of sale of realty,—see Contracts, 29, 31.

THEORY OF CASE.

Criminal Law—Defendant Bound by.

1. Defendant was charged with murder in the first degree and convicted of manslaughter. He acquiesced in the theory of the case that there was evidence upon which a verdict of manslaughter might be predicated, and did not object to instructions defining manslaughter and distinguishing it from murder, and telling the jury, *inter alia*, that they might find defendant guilty of murder in either

of its degrees, or manslaughter, etc. *Held*, that he was not in any position to complain that the jury did not find him guilty of a more serious offense, but was bound by the theory upon which the case was tried.—*State v. Crean*, 47.

Contracts—Action for Breach—Inapplicable Instruction.

2. In an action by a contractor upon a building contract, which provided that no certificate given or payment made, except the final certificate or payment, should be conclusive evidence of the performance of the contract, either wholly or in part, and that no payment should be construed as an acceptance of defective work and in which no waiver of such certificate was pleaded, an instruction that, although the contract provided that payment should be made to plaintiff only upon the architect's certificate, yet, if defendant had made payments without requiring the production of such certificates, then such requirement had been waived, and the failure to procure such certificate was not a bar to this action, was erroneous as not applicable to the theory of plaintiff's action.—*Piper v. Murray*, 230.

TRESPASSERS.

Injuries to, on railroad tracks,—see Personal Injuries, 1, 2.

VARIANCE.

See, also, Criminal Law, 7, 8.

Failure of Proof.

1. Where the evidence fails to establish the alleged cause of action in its general scope, there is presented, not a case of variance, but a failure of proof.—*McCrimmon v. Murray*, 457.

When Immaterial.

2. If plaintiff's proof follows substantially the allegations of his complaint, a slight, technical variance is immaterial.—*Wertz v. Lamb*, 477.

Admissions—Estoppel.

3. Where two defendants in an action to foreclose a mechanic's lien alleged affirmatively in their counterclaim that they had employed plaintiff to do the work described in his complaint, thus admitting that the contract was made by both, they were bound by the position assumed in their pleading and therefore estopped to claim that there was a fatal variance between the allegation of the complaint that the contract was made with both defendants, and his proof which showed an agreement with one of them only.—*Wertz v. Lamb*, 477.

VENUE.

See Change of Venue.

VERDICTS.

Excessive,—see Personal Injuries, 24, 25, 38.

Impeachment of verdicts by jurors,—see Criminal Law, 26.

WAIVER.

Contracts—Substitution of New Contract—Waiver of Fraud.

1. By agreeing to the substitution of a new contract for one deemed by him to have been fraudulent, plaintiff waived the fraud which entered into the execution of the former one.—*Ott v. Pace*, 82.

Complaint—Indefiniteness.

2. An objection to a complaint on the ground of indefiniteness is waived unless a special demurrer on that account is interposed.—*Billings Realty Co. v. Big Ditch Co.*, 251.

WATERS AND WATER RIGHTS.**Rights of Prior Appropriators—Diversion from Watershed.**

1. A city had by purchase acquired the first four appropriations of water on a certain stream, the total quantity in which at certain seasons of the year does not exceed 150 inches, which amount was ample, however, to supply the needs of the city and its inhabitants. The fourth in point of time was decreed to it in the amount of 1,000 inches, with the right to use it "beyond and without the watershed" of said creek. *Held*, in a suit for injunction, that under these conditions, the city was the first appropriator to the extent of 1,328 inches, the aggregate of the four appropriations, and that under the rule that a prior appropriator may change the point of his diversion or the use of his right, so long as it does not prejudicially affect that of any subsequent appropriator, the city had the right to divert the water from the watershed of the creek, in quantity sufficient to supply the needs of its proposed municipal water system.—*Carlson v. City of Helena*, 1.

Diversion by Prior Appropriator—Who may not Complain.

2. One who is not a subsequent appropriator of water cannot complain that an intended diversion by a prior owner may injuriously affect someone who has a water right subsequent in point of time to that owned by the prior appropriator.—*Carlson v. City of Helena*, 1.

Irrigation Canals—Injuries to Land—Description of Premises—Complaint—Sufficiency.

3. As against a general demurrer or objection to the introduction of evidence, a complaint seeking damages occasioned by the overflow of water from an irrigating canal, which described the land upon which the trespass was alleged to have been committed, as the north half of the northwest quarter of a certain section in a designated township, "with the exception of twenty-nine acres" theretofore sold, was sufficiently specific to identify the premises.—*Billings Realty Co. v. Big Ditch Co.*, 251.

Same—Liability of Corporation—Negligence of Agents—Presumptions.

4. A corporation organized to furnish water to its stockholders for irrigation and domestic purposes was not an insurer and could be held liable in damages only for negligence of its agents—not for that of trespassers—which negligence will not be presumed, but must be pleaded and proved.—*Billings Realty Co. v. Big Ditch Co.*, 251.

Same—Negligence of Stockholders—Agency—Liability of Corporation.

5. Evidence held to show that defendant company had constituted its stockholders its agents in the management of its canal, by permitting them, whenever they wanted water on their premises, to so manipulate the headgate as to cause the water to run in the desired direction; *held*, further, that therefore the company was liable for any damage through flooding occasioned by their negligence in thus taking water from the canal.—*Billings Realty Co. v. Big Ditch Co.*, 251.

Indefinite Findings—Appeal—Party Aggrieved—Harmless Error.

6. The court in a water right suit found appellant to be entitled to the use of a certain number of inches of water for "about two weeks in June" of each year. *Held*, that though the court's failure

to specifically ascertain the portion of the month to which appellant's use was to be confined rendered the finding vague and indefinite, appellant was not aggrieved, since he was left to his own choice in selecting the time of use, during the month of June, so long as he did not exceed the limit of two weeks, the lack of definiteness thus not working to his injury.—*Featherman v. Hennessy*, 310.

Change of Diversion and Use Permissible, When.

7. An appropriator of water may change the point of his diversion or use it for purposes other than that originally intended for it, provided the change does not affect injuriously the rights of subsequent appropriators.—*Featherman v. Hennessy*, 310.

Change of Use from Power to Agricultural Purposes—Effect on Date of Appropriation.

8. Appellant appropriated 1,500 inches of water for power purposes in 1883. In 1905 he changed the use of ninety inches thereof from power to agricultural purposes, which changed use resulted in a consumption of the quantity so diverted. *Held*, that under these circumstances the change of use amounted *pro tanto* to a new appropriation, and that therefore the right to use such amount must bear the date at which the change from the original purpose was made, *i. e.*, 1905.—*Featherman v. Hennessy*, 310.

WILLS.

Contest—Undue Influence—Insanity.

1. In a legal sense, undue influence in the making of a will cannot be exerted upon one who is so far insane or unconscious as to be destitute of testamentary capacity.—*In re Murphy's Estate*, 353.

Same—Undue Influence—Insanity—Inconsistent Findings—Effect.

2. Findings made in a case involving the probate of a will, (1) that testator was incompetent to make a will, and (2) that he executed the instrument while under undue influence, though involving illogical conclusions under the rule declared in paragraph 1, *supra*, held not so far inconsistent as to require the rendition of different decrees mutually destroying each other, and hence the reversal of the decree, but that, either being supported by the evidence, the other could properly be disregarded and the decree denying probate allowed to stand.—*In re Murphy's Estate*, 353.

Same—Setting Aside Will—Quantum of Proof.

3. A will should not be set aside except upon substantial evidence tending to show that it was not in fact the will of the testator.—*In re Murphy's Estate*, 353.

Same—Sanity—Presumptions—Instructions.

4. The presumption that all persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity attaches not only in a criminal case in which the defense of insanity is interposed (Rev. Codes, sec. 8113), but generally to human conduct in the relations of life; hence the giving of an instruction to that effect in a will contest in which the sanity of the testator was called in question was not error.—*In re Murphy's Estate*, 353.

Same—Presumptions—Intermittent Insanity.

5. The presumption that a thing once proved to exist continues as long as is usual with things of that nature applies only to those conditions which from their nature must continue for some appreciable length of time; it, therefore, has no application to cases of intermittent or occasional insanity, but only to those of an habitual or permanent nature.—*In re Murphy's Estate*, 353.

Same—Intermittent Insanity—Evidence—Immateriality.

6. Where the evidence in a contest involving the probate of a will tended to show that testator had been suffering from intermittent or occasional insanity, the question at issue was whether he was of sound mind at the time he executed the instrument; if so, evidence of his mental condition preceding and subsequent to its execution was immaterial.—*In re Murphy's Estate*, 353.

Same—Burden of Proof—Erroneous Instruction.

7. In a will contest, the general burden being upon the contestant to establish by a preponderance of the evidence the facts upon which he relies to set the will aside, it was error to instruct the jury that the proponent was bound to show that, insanity in testator having been shown to exist at a time preceding as well as subsequent to its execution, it was executed at a time when he was of sound and disposing mind, else they should find for contestant.—*In re Murphy's Estate*, 353.

Same.

8. The evidence as to whether testator's sanity was general and habitual, or intermittent only, having been in direct conflict, the instruction referred to in paragraph 7 above was further erroneous as invading the province of the jury in that it in effect assumed that his mental condition was habitual, a question exclusively for their determination.—*In re Murphy's Estate*, 353.

Same—Insanity—Depositions—Evidence—Inadmissibility.

9. A deposition taken to be used in a guardianship proceeding was improperly admitted in evidence in a contest involving the question whether the incompetent for whom a guardian was appointed, and who subsequently died of dementia, was sane or insane at the time he executed the will sought to be probated; neither the parties nor the subject matter were the same, hence the evidence was inadmissible under section 8010, Revised Codes.—*In re Murphy's Estate*, 353.

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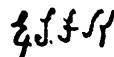
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